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No. 92- 92-1934

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

J.M. INDIVIDUALLY

Petitioner,

- against -

V.C., [redacted]

Respondent.

VOLUME II OF PETITIONER'S APPENDIX IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF NEW JERSEY

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A-239

SUPREME COURT OF NEW JERSEY

DOCKET NO. 35,952

J.M., individually	:	ON APPEAL FROM:
	:	SUPERIOR COURT OF NEW JERSEY
	:	APPELLATE DIVISION
Plaintiff-Appellant	:	DOCKET NO. A-4772-91T5
	:	
vs.	:	
	:	SAT BELOW:
	:	
V.C.; W.M.C.;	:	JUDGE(S): ANTELL
JOSEPH BLOW AND	:	DREIER
RICHARD ROE,	:	VILLANUEVA, t/a
fictitious names	:	
of real individuals,	:	
	:	
Defendants.	:	
	:	CIVIL ACTION
	:	

BRIEF OF PLAINTIFF-APPELLANT J.M., INDIVIDUALLY

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Statement of the Case: Nature of the Action, Statement of Facts, and Procedural History.

A. INTRODUCTION

This is an Appeal as of Right pursuant to Rule 2:2-1(a)(1). It presents important questions of first impression under the Constitutions of the State of New Jersey and the United States of America. It addresses perhaps the worst governmental deprivation of Individual Rights in the history of this state and this nation. It presents, among other issues, a state question that only the New Jersey Supreme Court can resolve: does the Constitution of the State of New Jersey extend rights to, and provide protection for, a child prior to birth?[1] Or does a mother have a right to take the life of her own child, for any reason, or no reason at all, at any time prior to birth despite the fact that the child is a human being who experiences pain? It requires a determination of whether the

[1] Depending upon the resolution of the federal constitutional issues, the N.J. Supreme Court may determine that the federal law eclipses that of the state up to "viability." However, because the state constitution, extends the right to life to the child from the moment of conception, the child's state's right prevail from viability onward. This question has unique significance in New Jersey because there are neither criminal nor civil prohibitions against post-viability abortions and the state specifically authorizes abortions after "viability"; see discussion below Point I, (A)(1) at pp. 16-21 to pp. 18-5.

State of New Jersey has the power to withhold rights from any class of individuals or whether the right of a human being to live depends solely upon the fact of his or her existence, independent of any governmental or political "grant". It implicates the role of government itself: is government created by people to protect their individual existence or does government exist independent of the people who only exist by the tolerance of government?

The appellant, J.M. brings this appeal seeking a reversal of the Appellate Division's affirmance of the ruling of the Chancery Court that he possessed no right to act as Guardian Ad Litem of his child [to prosecute the rights of his child] and no individual rights of his own.

This case involves the direct clash of the rights of the mother, the father and the child, implicating the definition, scope and nature of those rights, the required balancing of each, and the powers and duties of the State in protecting the rights of each, where the two natural parents disagree on the fundamental question of whether their child should continue to live.

There is no question (and the defendant has effectively conceded) that this case presents a justiciable controversy,[2] and that this court has jurisdiction[3] to decide the important issues. There will probably never be another civil case in this jurisdiction which affords a better opportunity for the court to address them.

B. STATEMENT OF FACTS

(i) The Relationship of J.M. and V.C.

J.M., 38 years of age, met V.C., 32, in July 1991. In September, 1991, the plaintiff first proposed marriage to the defendant. V.C., declined, indicating that she would consider marriage in the future. In February, 1992, V.C. suspected she was pregnant (by J.M.). A self-administered pregnancy test proved positive and a repeat test in the presence of the plaintiff duplicated that result (see certifications of J.M. at 9a to 18a). On Monday, March 2, 1992, V.C. was examined by a physician in Monmouth County (N.J.) who confirmed that she was then eight (8) weeks pregnant. J.M. expressed his support to her, again proposed marriage, and indicated that he would discharge his obligations as

[2] See discussion below at Pb. 13-7 to Pb. 14-16.

[3] See discussion Pb. 13-7 to Pb. 16-4.

father, whether or not they married or she felt capable of assisting in rearing the child. V.C. told J.M. that she was still unprepared for marriage and on March 4, 1992, she advised him that she had scheduled an abortion for the morning of Wednesday, March 11, 1992, at a facility located in Monmouth County (see cert. of J.M. at 18a). After J.M. was unable to persuade V.C. to abandon her plans to terminate the life of the child, he retained counsel on Saturday, March 7, 1992 and instituted this action on Monday, March 9, 1992 (14a to 15a). J.M. certified to the court that he was prepared to raise the child himself, but at the same time recognized that once the child was born, V.C. may at that time change her mind and decide to be the primary custodian of the child. J.M. certified that he would not interfere with such wishes of V.C. nor would he contest to be the primary custodian if she made that choice. In the event V.C. changed her mind and chose to be the primary custodian, J.M. certified that he would live up to his obligations as father (whether they married or not) with financial support and visitation. The support J.M. offered V.C., therefore, included marriage, or in the alternative, his offer to raise the child alone or in combination with her, subject to her wishes (12a to 13a).

Counsel for V.C. has represented that V.C. obtained an abortion terminating the child's life shortly after the New Jersey Supreme Court Order of March 24, vacating an injunction entered by the Chancery Division. The child was 11 weeks old. Had an abortion not been performed the child would be a newborn infant at the time this brief was filed.

(ii) Facts Pertinent to the Question of Whether Human Life Begins at Conception and the fact that an Unborn Child can Experience Pain during an Abortion Even at Early Stages of Development.

The record contains eloquent and powerful testimony of Dr. Jerome LeJeune, M.D.[4] and Dr. Bernard Nathanson, M.D.[5] Their

[4] Jerome LeJeune, M.D., who submitted certifications to the court, is a world renowned geneticist currently teaching at the University of Paris, France. He has one of the largest consultation practices in the world for mentally retarded children with difficulty due to chromosomal mistake (examining over 2,000 children each year and maintaining records of 30,000 children over his lifetime) (see 32a to 35a). Among the many of his life's achievements includes Dr. LeJeune's discovery of Down's Syndrome and its causes due to an "excess of genetic material" consisting of the extra chromosome, known as No. 21. Dr. LeJeune has been credited with the first discovery of a chromosomal abnormality in man (see 34a to 37a). In his work Dr. LeJeune attempts to understand the nature of every human being and how and why they are inflicted by "constitutional difficulty" (35a) in an effort to find the means to correct the illnesses. As a result of Dr. LeJeune's prominence in the field of genetics, he was selected as a representative of France as a member of the United Nations

testimony and the extensive scientific discussion in Point I(B) of this brief explains new knowledge of science, technology and medicine which bear upon the factual and legal considerations in this case. It supports three separate and pertinent conclusions: (1) The life of a specific individual human being is a seamless continuum that begins at conception when the individual is a

Scientific Committee concerning the danger of atomic radiation. While serving on the Scientific Committee at the United Nations he also became Vice President of the United Conference in Moscow. In addition he was a member of the Pontifical Academy of Science and is a member of a special group that studied the damage of atomic war. He was requested by Pope John Paul II to travel to Moscow to speak with Mr. Brezhnev on behalf of the Vatican. He was the first to give a course on human genetics at the California Institute of Technology (35a to 37a).

[5] Dr. Bernard Nathanson, who also submitted certifications to the court, is an accomplished obstetrician and gynecologist from New York City, educated at Cornell University and McGill University Medical College in Montreal, Canada. He was board certified by the American Board of Obstetricians and Gynecologists in 1960 and is currently an attending obstetrician and gynecologist at St. Vincent's Hospital in New York; St. Luke's Roosevelt Hospital, part of Columbia University College of Physicians and Surgeons; and New York Hospital Cornell Medical Center. Dr. Nathanson has published numerous scientific articles and several books in the area of bioethics, fetal development, embryology and fetology. He lectures in these areas and holds professorships at two universities. Dr. Nathanson probably has more experience in abortion technology than anyone in the Country, having been the director of the largest abortion clinic in the United States for two years, his research and publications in medical literature, his scientific papers on the techniques of abortion and his study of complications of abortion related issues (53a to 58a).

complete, separate human being with all genetic material specifically programmed for all future development and growth; (2) The individual is complete not only as to species but the unique identity of the specific member of the human race is complete, immediately upon conception; and (3) There is new scientific evidence which supports the conclusion that the unborn child experiences pain even in the early stages of development, as early as eight weeks after conception (see discussion, Point I). Man's knowledge of science and medicine has advanced to the point where reexamination of the available information is required.[6]

C. PROCEDURAL HISTORY

1.

The petitioner, J.M., instituted this action seeking an injunction preventing V.C. from terminating the life of their child through an abortion. He brought the action on behalf of himself, asserting his own constitutional rights, which he expressly pleaded

[6] There is little doubt that the New Jersey Supreme Court is afforded a fair opportunity in this case to reach reliable conclusions concerning these matters. The plaintiff has compiled a discussion with proper authoritative citations, with the assistance of accomplished geneticists, biochemists and medical doctors [see Point I(B) at Pb. 32 to Pb. 73]. There is little doubt that the defendant V.C., has access to the medical community and can add anything pertinent to the inquiry.

included his right to protect the life of his child and his right to act as guardian ad litem of his child (to prosecute the child's individual rights).[7] The complaint was filed in the Chancery Division of the Superior Court of New Jersey on March 9, 1992 (1a to 8a). In support of an application for temporary restraints enjoining the abortion, the plaintiff-appellant submitted affidavits of J.M., Dr. Jerome LeJeune (a French geneticist) and Dr. Bernard Nathanson (a prominent New York Obstetrician and Gynecologist) (see 9a to 58a) and noticed the defendants V.C. and W.M.C. The Chancery Division entered the order enjoining the abortion until a return date of March 30, 1992 (see 59a to 63a).[8] On March 13, 1992, the Appellate Division of the Superior Court of New Jersey entered an Order directing the parties and the lower court to proceed using only the initials of the respective parties (reversing the Chancery Division's Order denying J.M.'s request to protect the identity of the parties) (see 64a). V.C., through counsel, moved to dismiss

[7] An action was also brought by the child through a guardian ad litem. The procedure in the child's case is discussed below at Pb. 8-13 to Pb. 13-7.

[8] The Order, as signed reflects the date of March 7th, a Saturday. See 60a. The actual date of the Order was Monday, March 9, 1992 at 3:35 p.m.

the Complaint of J.M. individually, and dissolve the restraints. On March 19, 1992, the Chancery Court granted V.C.'s motion to dismiss the Complaint brought on behalf of J.M. individually.

In dismissing J.M.'s individual case, the Chancery Court ruled that J.M. did not possess "standing" and had no right to act as Guardian Ad Litem (and "prosecute" the child's rights). The Chancery Court alluded to J.M. as a "busy body" who has "no standing to prosecute this action." (IT7-1 to 22; IT13-18 to 22; IT16-13 to IT17-7; IT20- 3 to 9; IT21-10 to IT22-7; see Order 65a).

Thus, the Chancery Court dismissed J.M.'s individual claim, which included his right to act as guardian ad litem for the child (to protect the child's rights), and his personal substantive constitutional rights.

After a timely motion for reconsideration was denied, J.M. filed a timely Notice of Appeal in the Appellate Division of the Superior Court of New Jersey (see Notice of Appeal, 93a to 101a).[9] The Appellate Division affirmed the March 19 Order of

[9] The Notice of Appeal filed by J.M., individually, identified all of the issues raised on this appeal including, among others:

1. The unborn child of J.M. and V.C. is, as a matter of fact and law an individual member of the human race to whom

the Chancery Division on September 21, 1992, in response to the defendant's Motion for Summary Affirmance (see Order, 80a), while granting the plaintiff's Cross Motions including those to accelerate the disposition of the motion, and to supplement the record (see, Order, at 81a). The plaintiff-appellant filed a timely Notice of Appeal in the New Jersey Supreme Court on Monday, November 2, 1992 (see, 102a to 109a).

2.

(a)

constitutional rights under State and Federal law are extended. The unborn child is an individual member of the human race from the moment of conception.

2. J.M. individually has a right under both the State and Federal Constitutions to defend life which includes the life of his unborn child (N.J. Const. Article I, Section I).

3. J.M. individually has the standing to litigate the unborn child's substantive rights.

4. Included in the rights of the unborn child is the child's right to have one or both of his parents to assert his or her rights.

5. J.M. individually possesses a right to raise the legal rights of his children, including a child who is unborn.

6. The unborn child enjoys constitutional protection under the due process clause of the Fourteenth Amendment of the United States Constitution and under Article I, Section I of the Constitution of the State of New Jersey.

7. If the state has a compelling interest in protecting the life of an unborn child, then the child's father has an interest and corresponding right to protect that same life.

This appeal relates only to J.M.'s individual standing to prosecute the action on behalf of his child, raise the child's rights and his own individual rights. However, there was a separate procedure for the related case of the child, allowed by the Chancery Division to be brought by the child (through a guardian). The disposition of the child's case does not bear upon the right of J.M. to prosecute this appeal, or the jurisdiction of the New Jersey Supreme Court to decide it. The Appellate Division exercised its jurisdiction on J.M.'s individual appeal, and the defendant's admit that court possessed jurisdiction.[10] J.M. relates the procedure in the child's action only for the sake of clarity and completeness.

(b)

On March 19, 1992, when the Chancery Division dismissed J.M.'s individual claim on the basis that he had no standing to prosecute the child's action, (or other rights) the court denied V.C.'s motion to dismiss the complaint of the child (see Order, 65a). The Court intended to allow the child's claim to proceed by a guardian who the Court maintained had to be appointed by the

[10] V.C. argued that a higher court could not hear J.M.'s individual case because the Appellate Division had jurisdiction. J.M. also agreed that the Appellate Division had jurisdiction. See discussion below at Pb. 12-11 to Pb. 13-6.

Court, the father lacking a "right" to serve in that capacity (IT7-21; IT21-8, 9). The Court stated that he intended (no order was signed or entered) to appoint a guardian, and that he "would probably" appoint J.M. (IT20-3 to 9; IT56-20, 21). The Court ruled that J.M. had no rights including the right to act as guardian.

(c)

When the Chancery Judge denied V.C.'s motion to dismiss the child's complaint on March 19, he continued the restraints (Order, 65a; IT51-2 to IT53-19). The Court, declared a need to resolve the question of "when life begins", stating that a resolution of that question is a prerequisite to determine whether the unborn child enjoys constitutional rights, and observed that the courts in New Jersey have been called upon to make the difficult determination in defining when life ended (in the "right to die" cases) (see IT44-7 to 17; IT45-9 to 15).

V.C. immediately filed a motion with the Appellate Division seeking: (1) leave to appeal from the order of the Chancery Division refusing to dismiss the child's Complaint and summary reversal; and (2) dissolution of the Chancery Division's restraining order. The plaintiff, J.M. individually, filed a cross-motion seeking leave to appeal the interlocutory order of the Chancery Division

dismissing his Complaint. On March 23, 1992, the Appellate Division (Judge Shebell dissenting) granted V.C.'s motion for leave to appeal the injunction only and summarily reversed the Chancery Division, vacating the restraints. That court denied V.C.'s application for leave to appeal the Chancery Division's refusal to dismiss the guardian's complaint. J.M.'s motion for leave to appeal the dismissal of his individual complaint was denied. J.M.'s individual claim was never reviewed on the merits. The majority relied upon the U.S. Supreme Court rulings in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973) and *Planned Parenthood v. Danforth*, 428 U.S. 52, 96 S.Ct. 2831 (1976) (see 66a to 70a).

In his dissent, Judge Shebell explained that he would not have vacated the restraints and would have reversed the Chancery Division's dismissal of J.M.'s individual complaint, stating:

> "The law pertaining to abortion is in a state of flux. See *Webster v. Reproductive Health Services*, 492 U.S. 490, 106 L.Ed.2d 410 (1989); *Planned Parenthood of S.E. Pa. v. Casey*, 947 F.2d. 682, 695, 698 (3rd Cir. 1991). The United States Supreme Court's holding in *Roe v. Wade*, 410 U.S. 113, 35 L.Ed.2d 147 (1973), in the view of many, represents erroneous interpretation of the Constitution -inventing a constitutional right to an abortion, now exclusively in the mother....In this case, one of the recognized parents cries out for the right to "preserve" and thereafter "nurture" the child which the other seeks to irretrievably put beyond the reach of all courts. *Cf. Planned Parenthood of Cent. MO. v. Danforth*,

428 U.S. 52, 49 L.Ed.2d 788 (1976)...The courts...perhaps even because of this very case, may recognize an unborn child's right to life, or at least, the right of both parents to be heard on the issue. I would, therefore, continue the restraints wisely imposed by the trial judge..." (see 69a to 70a).

The Appellate division stayed its own order to permit both parties to be heard before the New Jersey Supreme Court the following day, March 24, 1992. As a result of the orders of the Appellate Division, the Complaint of the child was left undisturbed. The child, by a guardian (unappointed, but designed as J.M.), filed a motion in the New Jersey Supreme Court seeking leave to appeal from the interlocutory order of the Appellate Division dissolving the restraints. J.M. individually moved for leave to file an interlocutory appeal from the dismissal of his complaint. V.C. moved before the New Jersey Supreme Court seeking an Order granting leave to file an appeal from the interlocutory order denying a dismissal of the complaint of the child by the guardian. That Court granted leave to V.C., and summarily reversed the trial court, dismissing the complaint brought by the child (see 71a to 72a).

The Supreme Court declined to grant leave to J.M. individually (73a, 74a). The claim of J.M., individually was at that point never heard beyond the Chancery Division, including his rights to defend

the life of his child, act as guardian and protect the child's rights. The following day, March 25, 1992, the single Justice Applications for a Stay of the New Jersey Supreme Court orders were denied by Justices Souter and Thomas (76a, 77a).

(d)

The child, by its guardian, filed a Petition for Certiorari in the United States Supreme Court (the petition, two supplemental briefs of J.M., and two reply briefs of J.M., all filed in the Supreme Court of the United States were made part of the record in the Appellate Division of the Superior Court on J.M.'s individual appeal). J.M., always acknowledging that his individual case was pending in the Appellate Division, also filed a Petition in the United States Supreme Court. V.C. agreed and argued that J.M.'s individual claim was pending in the Appellate Division.[11] The fact that J.M.'s case was pending in the Appellate Division was never in dispute but the legal question, under federal law, of whether the United States Supreme Court could take jurisdiction, despite that fact, was in dispute.[12] The Supreme Court of the United States

[11] See part of V.C.'s Brief at 110a to 112a.

[12] See part of V.C.'s brief at 110a to 112a. See part of J.M.'s Reply Brief at 113a to 115a.

denied both petitions, thereby ending the child's case. J.M.'s appeal to the Appellate Division of the Superior Court of New Jersey was affirmed on the merits on September 21, 1992. That case is now properly before the Supreme Court of New Jersey.

D.

JUSTICIABILITY

1.

Although the defendant represents that the child's life has been terminated, this case still presents a justiciable controversy. Based upon the principles annunciated by the U.S. Supreme Court in *Roe v. Wade*, 410 U.S. 113, 93 S.Ct. 705 (1973), the case presents a justiciable controversy because V.C. was pregnant at the time the complaint was filed and for sometime thereafter. If a woman is pregnant at the time of the filing of a complaint, the "termination" of the pregnancy does not render the case moot where the issue pertains to the pregnancy. *Roe*, 410 at 124, 125, 93 S.Ct. at 712, 713. In *Roe* the court concluded that pregnancy litigation provides a classic justification for a conclusion of non-mootness because it truly presents a situation that is "capable of repetition, yet evading review". *Roe v. Wade* at 410 U.S. at 124, 93 S.Ct. at 712.

The *Roe* court was able to create the law concerning abortion only because of this rule of appellate review. The plaintiff in *Roe* was not pregnant at the time of the hearing on the trial in May of 1970, almost three years before the Supreme Court of the United States issued its opinion in the case. *Roe*, 410 U.S. at 127, 93 S.Ct. 712. The court observed that:

> "if...termination (of pregnancy) makes a case moot, pregnancy litigation seldom will survive much beyond the trial stage and appellate review will be effectively denied."

Roe, 410 U.S. at 125, 93 S.Ct. at 713. *Roe*, therefore created the criteria for cases dealing with abortion law. That rule must be applied here, or *Roe* itself could never be effectively reviewed. The defendant in this case has consistently declined to challenge this point during the appellate process in the Appellate Division as well as the filing in the United States Supreme Court on the child's petition.

2.

By the precedent established in *Roe v. Wade*, and, inferentially, for the same reasons J.M.'s appeal is not moot, the New Jersey Supreme Court has jurisdiction over issues relating to the entire nine months of pregnancy. J.M. argues the rights of the child, and his right to defend the child at all stages of development

from conception to birth. This case presents, perhaps, the first and maybe the last opportunity for the New Jersey Supreme Court to resolve these compelling issues in the context of a civil case, including the question of whether the child possesses rights prior to birth (at all stages or any particular stage). This point was made clear when the majority in *Roe* created very precise rules of law governing all stages of the child's development despite the fact that the pregnancy in that case had terminated before May 22, 1970 and the complaint was filed in March only two months earlier. The majority rejected the argument of the dissent that the Court should not review all nine months of the pregnancy. Justice Rehnquist had argued that there was no evidence that the child was ever at most stages of development during the proceeding of the litigation (only two months) and objected that the court created law pertaining to those stages of development nonetheless. See Rehnquist, J. Dissenting, 410 U.S. 171, 172, 93 S.Ct. at 736. The majority totally rejected this objection of the Dissent.

It would seem obvious that the rules of justiciability employed to create the right of a mother to terminate the life of her child must also apply to the challenge by the child and the child's father in asserting their rights and a review or reexamination of the law

delineating the respective right. J.M. observes that no case such as this, where a father seeks to assert his right to protect his child, by asserting the child's rights, has ever been reviewed by this court or the United States Supreme Court. Unlike all cases subsequent to *Roe*, this one does not pit the rights of a woman against the poorly defined right of a state. Rather, it places the rights of a child and a father's right to prosecute those rights against the power of a state which authorizes the taking of the child's life. Because of the clear state action, the quality of the record, and the fact that the case squarely presents questions never before decided by this Court, this case is perhaps the best opportunity for this court to decide the substantial questions of importance for the people of this state.[13] No other entity can determine whether a child possesses rights prior to birth under our state constitution.

POINT I

RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE CHILD

[13] Similar questions are presented in the context of a quasi-criminal municipal court case in ***State v. Alexander Loce***, currently pending in the Appellate Division.

EXPERIENCES PAIN PRIOR TO BIRTH EVEN IN THE VERY EARLY STAGES OF DEVELOPMENT AND (2) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION. THESE FACTS, ARE RELEVANT TO THE QUESTION OF WHETHER A CHILD POSSESSES RIGHTS PRIOR TO BIRTH UNDER THE CONSTITUTION OF THE STATE OF NEW JERSEY AND THE NEW DATA AND INFORMATION REQUIRES A REEXAMINATION OF THE LEGAL QUESTION OF WHETHER AN UNBORN CHILD POSSESSES RIGHTS UNDER THE FOURTEENTH AMENDMENT.

A.

THE RELEVANCE OF THE FACTS AND NEW TECHNOLOGIES.

J.M. asserts his right and standing to prosecute his child's action. The legal analysis which concludes that his child enjoys constitutional rights prior to birth under both the constitution of the State of New Jersey and the Fourteenth Amendment of the Constitution of the United States rests upon the fact that the life of a human being begins at conception and is a complete and separate human being at every stage of development. It is also relevant to the legal question that the child is capable of experiencing pain prior to birth even at the early stages of development.

1. THE STATE RIGHTS.

Independent of the federal issues, the question of whether the child has rights after conception and prior to birth [or J.M. has his own individual rights] under the State Constitution is a question of first impression (in the abortion context) for the Supreme Court of New Jersey to determine. The question of whether the child [and J.M.] enjoys rights before birth but after viability is a state question free of any Federal Restraint. *Roe v. Wade*, 410 U.S. 113, at 164, 165, 93 S.Ct. 705 at 732 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. 2791 at 2804, Slip Op. at 4 (1992).

This inquiry is of importance because the State of New Jersey licenses doctors, health professionals and medical institutions and specifically authorizes medical procedures designed to terminate the life of a child right up to the moment of birth.

In 1978 New Jersey Repealed N.J.S.A. 2A:87-1 which made abortion a high misdemeanor. In doing so it removed all prohibition against a mother seeking to take the life of her child. New Jersey, in licensing its physicians, involved itself in the offensive conduct, and specifically gave them authority to terminate the life of a child before birth. New Jersey licenses and regulates doctors and

hospitals through the Board of Medical Examiners. New Jersey's Administrative Code states that only a physician licensed by the state may perform an abortion. Reg. of Bd. of Med. Exam. 13:35-42(b) (Termination of Pregnancy).

The regulations of the doctors specifically and affirmatively authorize abortions anytime prior to birth. Even between 20 weeks gestation and actual birth the only limitations placed upon an abortion is that the doctor must request from the State Board permission to perform a "D and E" procedure (always fatal to the child)[14] in a licensed ambulatory care facility. N.J.A.C. 13:35-4.2(g). The physician, in order to obtain such permission, need only show he or she has the proper training.

The state has created rules by which it literally licenses individuals to take the life of a child anytime prior to actual birth. This specific licensing and regulation, together with repeal of all prohibitions against abortion, constitutes the creation of rules of a legal framework by which a child's life can be taken after viability.[15]

[14] See, *Planned Par., Kansas City v. Ashcroft*, 462 U.S. 476, 483, 103 S.Ct. 2517, 2521.

[15] See also, discussion on state action, Point VI, below.

2. THE FEDERAL RIGHTS.

(a) *Introduction - The Legal Principles Set Forth in Roe Concerning the Rights of the Child Prior to Birth.*

In *Roe v. Wade* the United States Supreme Court concluded that Texas' imposition of criminal penalty for abortions was not justified based upon that "state's determination to recognize and protect prenatal life from and after conception (constituting) a compelling state interest." *Roe* decided that a State's interest in protecting the life of an unborn child is compelling only in the third trimester of pregnancy. 410 U.S. at 163 S.Ct. at 732.

The underlying basis for the *Roe* Court's conclusion was the premise that in 1973 it was not possible to determine when life begins.

To this day *Roe* is the only case in which the United States Supreme Court reviewed that issue.[16] However, significant recent developments and discoveries in science and medicine require a thorough re-examination of Section IX(A) and IX(B) of

[16] In the recent case of *Planned Parenthood of S.E. Pa. v. Casey*, U.S. ___, 112 S.Ct. 2791 (1992) the Court reexamined *Roe* on many issues including the rights of the mother. *Casey* did not review Section IX(A) and IX(B) of *Roe* dealing with the fundamental question of whether the child had rights. *Casey* left this question open.

Roe v. Wade.[17] The conclusion of the Supreme Court that a state's interest in protecting prenatal life was compelling at one stage but not at another involved two general inquiries that were separate yet inextricably connected: (a) whether the Fourteenth Amendment provided a child Federal constitution protection prior to birth under the Due Process clause; and (b) when does the life of a human being begin. Because the court felt unable to determine, in 1973, when life began, the court declined to extend rights to the child before birth. Two important statements that were made now require scrutiny:

> (1)"...The word 'person', as used in the Fourteenth Amendment, does not include the unborn." 410 U.S. at 158, 93 S.Ct. at 729; (2) we need not resolve the difficult question of when life begins. When those trained in the respective disciplines of medicine, philosophy and theology are unable to arrive at any consensus, the judiciary, at this point in the development of man's knowledge, is not in a position to speculate as to the answer." 410 U.S. at 159, 93 S.Ct. at 730. (emphasis added)

(b) *Whether The Child Has Constitutional Rights is a Mixed Question of Fact and Law.*

The question of whether an unborn child is a person who enjoys constitutional rights under the Fourteenth Amendment is a

[17] 410 U.S. at 156-162, 93 S.Ct. at 728-731.

legal one, but one which includes an important factual component. Science and medicine are currently able to provide data and information pertinent to the factual considerations far beyond that contributed in 1973. The legal inquiry, simply put, is whether the human life with which we deal does or should enjoy rights under the Fourteenth Amendment at any or at all stages of development between conception and birth (recognizing that children who survive birth range in age from twenty-three weeks to forty weeks post conception). By suggesting that science and medicine can establish when the biological life of a person begins is not to suggest that the court should defer to science. The ultimate judgment, being a legal one, must be arrived at in consultation with science. By reaching a legal conclusion concerning which human beings, and at what age of development, enjoy constitutional rights the court makes the judgment of when life begins because the practical consequences of the judgment necessarily include the factual considerations.[18] This judgment

[18] While we sincerely empathize with the sentiments expressed by Justice Scalia in his concurring opinion in *Cruzan v. Director, Missouri Department of Health*, 110 S.Ct. 2841 at 2859 (1990), there are certain issues, even concerning life and death, that only the nine justices of the United States Supreme Court or the seven Justices of the Supreme Court of New Jersey have the power to

is made by default, in the absence of a determination. Expressly stated or not, that is really the motivating force which gave birth to the trimester formula: what we knew weighed against what we were not sure of.

There can no longer be serious doubt about when the life of a human being begins (see Point I Section B(2) and Appendix B.) That some members of the scientific community might postulate that there is no consensus on when life begins, indeed some have so stated to this Court, does not contradict the reliability and wide spread acceptability of the relevant scientific information.[19] Based upon the scientific factual data the human is biologically complete at conception.[20] That some scientists personally prefer to give that human life no value expresses a view which does not lie within their domain and it merits no more consideration than the

determine, the only consolation being that the rest of us will bring to them their thoughts, abilities, arguments and knowledge. When a state completely fails to protect the life of a human being, affirmatively acts to terminate that life, even a human being yet born, and that state's act results in a painful, brutal death of a member of the human race there is nowhere left to appeal but the New Jersey Supreme Court on the state constitutional issues (and the United States Supreme Court on the federal issue).

[19] See discussion Point I(B)(2)(b).

[20] See, Point I(B)(2)(a)(b) and Appendix B at xva attached.

view of those from non-scientific disciplines. The value judgments of political entities cannot deprive an individual human being his natural and unalienable right to life.[21]

When human life begins is truly a legal question. It is a legal question that encompasses factual questions scientific and medical in nature, as well as ethical and moral concerns. It is the promise of the law, especially constitutional law, to balance the relative harms conduct has on individuals. Legal questions often encompass these moral and ethical considerations. Oliver Wendell Holmes once observed:

> "The law is a witness and external deposit of our moral life. Its history is the history of the moral development of the race."[22]

(c) *The Inability of the Roe Court to Reach a Conclusion on the Factual Component of the Inquiry Before it Lead to a Wholly Different Legal Analysis than that Required if the Court Found, as a Matter of Fact, that Life Begins at Conception or Prior to Birth.*

If the *Roe* Court had the benefit of man's current knowledge it would have concluded that the life of a human being begins at

[21] See Point II.

[22] Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harvard Law Review*, 457 (1897).

conception, and a child is capable of experiencing pain prior to birth and as early as eight or nine weeks gestation.[23] This conclusion compels the type of legal analysis discussed in Points II through V of this brief. Because the court felt unable to arrive at an answer to the factual aspect of the question, the legal analysis performed by the *Roe* court was very different from, and quite irrelevant to, the one the court must do once the court has found that life begins at conception.

The *Roe* court found that it was "persuaded" that the word "person" "as used in the Fourteenth Amendment" did not include the unborn. 410 U.S. at 158, 93 S.Ct. at 729. To reach this statement the court primarily relied upon a review of those clauses in which the word "person" appeared. This approach becomes irrelevant when it is recognized that life begins at conception (or any stage before birth) for a number of reasons. For one thing, it would have to ignore the equal protection clause of the Fourteenth Amendment. Two clauses that the court noted as containing the word "person" were the Fifth Amendment Due Process Clause and Article IV, §2, clause 3 (fugitive slave clause). The Fifth

[23] See discussion, Point I(B).

Amendment extends due process to any "person." The fugitive slave clause applied the term "person" to individuals who did not enjoy liberty within the slave states. It would appear that the term when used in Article IV, ratified in 1787, and the Fifth Amendment Due Process Clause, ratified in 1792, was an all inclusive term because it included natural persons who enjoyed constitutional protections and natural persons who did not enjoy liberties but were subject to slavery laws.

However, in determining whether the word "person" as used in the due process clause, which was ratified in 1868, could have been intended to include some classes of human beings but not others (which is what the *Roe* court would have to infer if it concluded that life began before birth as a matter of fact) the court should have construed the due process clause in *pari materia* with the equal protection clause (introduced to the constitution for the first time in the Fourteenth Amendment). The equal protection clause forbids denial to "any person within its jurisdiction" the equal protection of the laws. To suggest that the word "person" as used in the equal protection clause (and therefore the due process clause) could contain classes of "persons" and that the clause would apply to some but not to others, would constitute an

inherent contradiction which would render the equal protection clause totally meaningless and without consequence. Therefore, any legal inquiry into the legal question of whether the Fourteenth Amendment protects an unborn child (and the meaning of the word "person") can only be conducted simultaneously with the *Roe* court's inquiry under Section IX(B), when the life of a human being (the life of a person) begins.

Secondly, *Roe* ignored prior precedent of the United States Supreme Court which specifically found that a corporation was a "person" which enjoyed liberty rights under the Fourteenth Amendment. *Grosjean v. American Press Co.*, 297 U.S. 233 (1936). *Grosjean* has relevance here in three separate ways. First, a corporation no more meets the *Roe* test for a "person" than does a child prior to birth. The only difference was that the Supreme Court in *Grosjean* had to acknowledge the existence of a corporation, where the *Roe* court felt it could not recognize the existence of the child based upon "man's knowledge" in 1973. "Existence" becomes the most pertinent question.[24] No theory of individual rights could justify inclusion of the legal fiction of a

[24] See discussion Point II(B).

corporation as a "person" and deny a child's existence based upon the current state of scientific and medical knowledge. Second, *Grosjean* has precedental value on the issue of *stare decisis* to overrule *Roe* (in excluding children prior to birth) because *Grosjean* specifically construed the same word ("person") in the same due process clause and overruled prior cases which excluded corporation as "persons" who enjoyed liberty interests under the due process clause. See, *Northwestern Life Insurance Co. v. Riggs*, 203 U.S. 243, 255 (1907); *Western Turf Association v. Greenberg*, 204 U.S. 359, 363; *Pierce v. Society of Sisters*, 268 U.S. 510, 45 S.Ct. 571 (1925). *Grosjean* is specific precedent of the United States Supreme Court which expanded the class of "persons" to whom the due process clause applies.

Third, *Grosjean*,as well as all of the other cases of the U.S. Supreme Court which dealt with the rights of corporations under the fourteenth amendment, specifically found that a corporation, although it was not a person under the citizenship clause contained in the first sentence of that amendment because it was not "born" or "naturalized", was a person which enjoyed rights under the due process clause. It cannot be said, therefore, that birth is a requirement of persons under the due process clause.

The real issue, all of this points out, is that *Roe* is built upon the worst form of contradiction: corporations are created by government, yet the court holds that Due Process cannot be withheld from them; individual human beings, whose lives and existence are created independent of government, owing nothing to government concerning the gift of life itself, the court has withheld from some the recognition of the unalienable right to live.[25]

(d) *The Question of the Child's Rights is the Sort of Mixed Question of Fact and Law Which, by Accepted Principles of Stare Decisis, Requires a Reexamination and Overruling of Prior Precedent (Roe) When New Facts, or New Appreciation of Old Ones, Demonstrate that Prior Precedent Erroneously Applied Constitutional Principles.*

Stare decisis is not a bar to the reexamination which we urge when new facts, or new appreciation of old ones, justify it. Our research has disclosed one hundred and seventy-four instances in which the United States Supreme Court has overruled, in whole or in part, its previous constitutional decisions.[26]

[25] See discussion Point II(B).

[26] The present compilation of the 174 cases noted is based primarily upon the following authoritative sources: Justice Brandeis, dissenting in *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 406-409 n1. (1932); *Annette E. Wilson "Stare Decisis"*

Of particular relevance here is the now classic and often cited statement of Justice Brandeis contained in his dissenting opinion in *Burnett v. Coronado Oil and Gas Co.*, 285 U.S. 393, 405-413. Justice Brandeis there stated, in pertinent part:

> "The reasons why this court should refuse to follow an earlier constitutional decision which it deems erroneous are particularly strong where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution...The controversy is usually over the application to existing conditions of some well recognized constitutional limitation. This is strikingly true of cases under the due process clause when the question of whether a statute is unreasonable, arbitrary or capricious; of cases under the equal protection clause when a question is whether there is any reasonable basis for the classification made by a statute;...In every such case the decision, in the first instance, is dependent upon the determination of what in legal parlance is called a fact, as distinguished from the declaration of a rule of law. When the underlying fact has been found, the legal result follows inevitably. The circumstances that the decision of that fact is made by a court instead of by a jury, should not be allowed to obscure its real character." 285 U.S. at 410, 441.

Quo Vadis? 33 Geo. L.J. 251, 254 n. 17 265(1945); William O. Douglas "stare decisis" 49 Colum. L.Rev. 735-743, 756-758(1949); Albert R. Balustein and Andrew H. Field, Overruling Opinions in the Supreme Court 57 Mich. L.Rev. 151, 184-194(1958); The Constitution of the United States of America: Analysis and Interpretation, 1317-18, Lester S. Jayson, et al. ed. (1973). Payne v. Tennessee, Marshal, J., dissenting, 111 S.Ct. 2597, 2610, 2611 n.1 (1991). For the complete list of cases, see the Appendix A immediately following this Brief.

The question of whether an unborn child is a person to whom the Fourteenth Amendment should be applied is a mixed question of fact and law, and is precisely the type of determination, when man's knowledge becomes more extensive, of which Justice Brandeis speaks. The Brandeis analysis has been frequently cited with approval. See *Solorio v. U.S.*, 107 S.Ct. 2924, 2999 (1987) (expressly overruling *O'Callahan v. Parker*, 395 U.S. 250 (1969)); *United States v. Scott*, 98 S.Ct. 2187, 2199 (1978). *Webster v. Reproductive Health Services*, 492 U.S. 490, 109 S.Ct. 3040, 3067 (1989) (Blackman, J., dissenting).

In reaffirming that portion of *Roe v. Wade* which found that the Due Process Clause of the Fourteenth Amendment "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy," *Roe*, 410 U.S. at 153, 93 S.Ct. at 727, the Court in *Casey*, expressly declined to state that *Roe* was

correctly decided either on constitutional principles[27] or moral grounds,[28] and articulated a reluctance to do so.[29]

The Court, not being able to affirm either *Roe's* correctness or its morality, preserved a mother's right based upon *stare decisis* and special considerations because of a divisive national debate. Whether or not the principles outlined in *Casey* operate as a bar to overturning the mother's rights found in *Roe*, they clearly are not a bar in the JM case on the question of his standing to prosecute the child's rights.[30]

[27] "We do not need to say whether each of us, had we been Members of the Court when the valuation of the State interest came before it as an original matter, would have concluded, as the *Roe* court did, that its weight in insufficient to justify a ban on abortions prior to viability even when it is subject to certain exceptions. The matter is not before us in the first instance, and coming as it does after nearly twenty years of litigation in *Roe's* wake we are satisfied that the immediate question is not the soundness of *Roe's* resolution of the issue, but the precedental force that must be accorded to its holding." *Casey*, ___ U.S. ___, 112 S.Ct. at 2817, Slip Op. at 29.

[28] "Some of us as individuals find abortion offensive to our most basic principles of morality,..." (*Casey*, ___ U.S. ___, 112 S.Ct. at 2806, Slip Op. at 8).

[29] *Casey*, Slip Op. at 11; Slip Op. at 19, 112 S.Ct. at 2808; 112 S.Ct. at 2812.

[30] Discussion related to the *stare decisis* issue are found here, under Point IV(A) and Point VII below. This present treatment is only in the context of the relevance of the new technologies and

JM relies upon Justice Brandeis' analysis in his dissent in *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 405-413 (1932) cited by the Joint Opinion in *Casey*, 112 S.Ct. 2809, Slip Op. at 12, as providing the kind of reasons which would justify overruling *Roe*.

Two critical distinctions made by Justice Brandeis apply here. First, where the Due Process Clause has been erroneously *applied* (as opposed to erroneously interpreted), overruling the prior decision is more easily justified. That principle has application here because the problem is not one of interpretation (clearly the Due Process Clause textually affirms the right to life of all persons), but rather one of applying a recognized right to a specific circumstance. Secondly, Justice Brandeis distinguishes those legal questions which are by their nature mixed questions of fact and law. The legal question of whether the unborn child enjoys constitutional rights is such a question.

The enormous technological advances since the time of *Roe* have discovered facts and data which support the conclusion that the unborn child experiences pain in the third trimester, and as

scientific and medical data.

early as the first trimester. (See Point I(B)(3)(b) at Pb. 53 to Pb. 73.) The new technology has also developed techniques resulting in discoveries which conclusively establish that the biological life of a human being begins at conception. (See Point I(B)).[31]

The Joint Opinion likens *Brown v. Bd. of Ed.*, 347, U.S. 483 (1954) to the type of case referred to by Justice Brandeis. *Casey* observed that the facts which controlled the *Brown* ruling were the same at the time of *Plessy v. Ferguson*, 163 U.S. 537 (1896) which *Brown* overruled, but the *Plessy* court either did not understand them, or the justices, for one reason or another, did not recognize them. *Casey*, 112 S.Ct. at 2812, 2813, Slip Op. at 20, 21. *Casey* explains:

> While we think *Plessy* was wrong the day it was decided, see *Plessy, supra*, at 552-564 (Harlan J. dissenting), we must also recognize that the *Plessy* court's explanation for its decision was so clearly at odds with the facts apparent to the court in 1954 that the decision to examine *Plessy*

[31] "Viability" is irrelevant to both general inquiries. The child is never "independent" in the sense that she is free from dependence on others for nourishment and protection. "Viability" does not change this fact. The child, however, is "independent" from the moment of conception in the sense that the child is a separate, complete and unique human being. Viability is only a stage of development no more significant than any other, not a moment defining "essence." See discussion and authorities below at Pb. 81-18 to Pb. 85-6.

was on this ground alone not only justified but required. *Casey*, 112 S.Ct. at 2813, Slip Op. at 21.

These observations have special application to the JM case. Whether or not the *Roe* court believed that it could not determine when the life of a human being began, no one could, in light of the present evidence, dispute that the biological life of a complete, separate and individual human being begins at conception. (See discussion Point I(B) and Appendix B at xva to xxiia).

The comments made by *Casey* concerning the *Plessy* decision have equal application to *Roe*. One can imagine that if *Roe* is overruled by J.M. on the question of the child's rights, that *Casey's* statement could be reprinted with small modification to read:

> "society's understanding of the facts upon which a constitutional ruling was sought in 1992 (JM) was thus fundamentally different from the basis claimed for the decision in 1973 (Roe)". 112 S.Ct. at 2813, Slip Op. at 21.

Roe resembles *Plessy* more than *Brown*; and *Brown* would more resemble JM. To the observations of the dissent concerning the differences between *Brown* and *Roe* we add that *Roe* does not

possess the moral force of *Brown*.[32] Although both decisions met with disapproval, twenty years after *Brown* was decided no *responsible public official* would publicly state that the decision was not based upon sound moral and legal grounds. Twenty years after *Roe* it is apparent that the force of disagreement is driven by the fact that the decision is not based on solid moral or legal grounds. *Roe* shall never command the respect that *Brown* has. *Brown* corrected a wrong, *Roe* created one.

B.

RECENT SCIENTIFIC, MEDICAL AND TECHNOLOGICAL ADVANCES AND DISCOVERIES PROVIDE A LARGE BODY OF NEW FACTUAL DATA AND INFORMATION WHICH SUPPORTS THE CONCLUSION THAT: (1) THE LIFE OF A HUMAN BEING BEGINS AT CONCEPTION AND (2) THE UNBORN CHILD EXPERIENCES PAIN DURING ABORTIONS EVEN IN THE EARLY STAGES OF DEVELOPMENT. THERE IS A CONSENSUS WITHIN THE SCIENTIFIC AND MEDICAL COMMUNITIES CONCERNING THE CRITICAL BIOLOGICAL AND GENETIC FACTS WHICH SUPPORT THE CONCLUSION THAT THE LIFE OF A PERSON BEGINS AT CONCEPTION.

1. Introduction: The Exploding Revolution of Molecular Biology Has Changed Man's Knowledge of Developmental Neurology.

[32] Also, *Brown* was the product of an unanimous court acting to implement that which was just and moral. *Casey's* call for acceptance of *Roe's* unjust and incorrect ruling is made by three justices of a badly divided Court.

Biologically, human beings are made up of molecular building blocks. Their development is controlled by the genetic material DNA and RNA. The instructions that can be found in this genetic material are carried out by the synthesis and functioning of proteins. Recent advancements in science mean, in practical terms, that the scientific investigator can now ask at the molecular level, using recombinant DNA technology[33] and monoclonal antibody technology,[34] if the instructions (made up of DNA and RNA) to make a particular protein exist and also if that instruction has been transcribed (read). Furthermore, the scientist can determine if a specific protein has indeed been produced from specific genetic instruction.[35] These scientific techniques, combined with immunochemistry technology, can be used to show that a particular protein is present in a specific sample; and when

[33] Watson, J.D.; Tooze, J.; and Kurtz, D.T. *Recombinant DNA: A Short Course*. San Francisco: W.H. Freman, 1983.

[34] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985.

[35] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development* In *Biotechnology* In *Basic Life Sciences* 25(1983): 129-154, at p. 129.

this is combined with an appropriate visualization technique, the location of the protein in the sample can be determined.[36] In

[36] Since the *Roe* Court commented upon the then current knowledge of mankind in 1973, there have been many scientific, medical and technological advances and discoveries, many in the last five years. These include the following: (1) Recombinant DNA Technology (methodology which among other things) allows the product of a large amount of specific pieces of DNA which assists in DNA probe research); (2) DNA Probe Technology (use of pieces of DNA that are radioactively labeled to find a piece of DNA or RNA that is related in sequence. Among any other uses, it is a method which identifies the DNA or RNA that codes for "Substance P"); (3) Southern Blot (the technology that combines the separation of molecules by electric charge and size with DNA probe technology); (4) Northern Blot (the technique that combines the separation of molecules by electric charge and size along with RNA probe technology for DNA); (5) DNA Mapping (the process by which a map is made with guide posts of the DNA available in a particular sample (including chromosomes). The mapping is often accomplished by cutting the DNA molecule into pieces and then determining from where the pieces were derived); (6) DNA Finger Printing (a procedure first demonstrated in 1985, whereby DNA probes to minisatellite regions of human DNA are used to provide a complex Southern Blot pattern. The procedure is finding increased usefulness in forensic science and legal medicine as it provides a test for relatedness between samples of DNA (extracted from human tissue). Used in conjunction with the PCR technique such comparisons can be done on as little as one cell from each source; (7) Polymerase Chain Reaction (PCR) (PCR - a test-tube method of amplifying DNA sequences hundreds of millions to billions of times invented in late 1984 and 1985 and can be used to obtain information from a single cell); (8) Monoclonal Anti-Body Technology (antibody preparation which contains only single type of antibody molecule); (9) Hybridona Technique (used to produce human specific antibodies and in the detection of Substance P and other human proteins or peptides); (10) Flow Cytometry (a technique by which cells in suspension, often marked with fluorescent monoclonal antibodies are intercepted by a beam of

1973 most of our knowledge concerning human identity and development before birth was based upon gross morphological observations and biochemical studies on often heroic quantities of material. An example would be in a case where a scientist would

light (a laser is often used) the interaction produces signals which drive a cell sorting apparatus which sorts and counts cells based upon a desired property. The technique is being used to completely remap the nervous system and for prenatal diagnosis with fetal cells isolated from maternal blood); (11) Improved Ultrasound Technology (vastly superior technology which permits observation of the fetus at early ages of gestation); (12) DNA Methylation (modification of DNA so that it is recognized as different); (13) Fetal Heart Monitoring (device which creates the ability to observe the operation of the human heart of the fetus at early stages of development); (14) DNA cloning (the application of deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976. DNA-based tests were first applied on a practical basis for the prenatal diagnosis of alpha-Thalassemia in 1978, sickle cell anemia in 1978, beta-thalassemia in 1980, hemophilia A in 1985, hemophilia B in 1984, phenylketonuria in 1985, Duchenne and Becker muscular dystrophy in 1985, cystic fibrosis in 1986, and Huntington's disease in 1986. This list provides "an indication of the explosion of knowledge and new diagnostic possibilities that have recently occurred." Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991)); and (15) the use of restriction endonuclease enzymes (Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodes." In *Basic Biology of New Development* In *Biotechnology In Basic Life Sciences* 25(1983): 129-154, at p. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

observe a physical structure such as the cerebral cortex or dendritic spines, and when that structure was not present or was removed, the scientist would observe what appeared to happen (the visual result). Since 1973, the new techniques of molecular biology and monoclonal antibody technology have allowed scientists to learn what is occurring in a developing human even before we can see specific structures develop. Scientists can now look at a human's building blocks, the proteins and instructions that control the proteins, so they not only view what happens at a molecular level, but also view when it happens. On a macroscopic level, the new technology of ultrasound and its application to the study of the unborn child in utero (in the womb) has accommodated observation of, with unprecedented clarity, how the unborn human reacts to its environment. Advances in electroencephalography have allowed for the early detection of brain wave activity in the fetus. The results of these investigations demonstrate the level of ignorance concerning the human fetus in 1973. The results point out errors of fact and judgment concerning the then scientific understanding of the human fetus' existence as a unique human being, his or her

development from conception to old age, and the child's ability to react to its environment and to feel pain prior to birth.

The origin and extensive use of molecular biological techniques since 1973 have dramatically changed the way in which modern biology is carried out. By using DNA probe technology, combined with the Southern Hybridization technique, for example, scientists are able to detect the presence or absence of a specific genetic code or instruction in a sample of tissue. When DNA probe techniques are combined with a tool called polymerase chain reaction (PCR)[37] it is possible to identify the presence of a specific genetic code material in a sample as small as one cell[38]. The unprecedented specificity and sensitivity of these techniques

[37] Arnheim, N.; and Levenson, C.H. 1990. "Polymerase Chain Reaction." *Chemical & Engineering News* (Oct. 1990): 36-47, at p. 36. White, T.J.; Arnheim, N.; and Erlich, H.A. "The Polymerase Chain Reaction." *Trends Genet* 5(1989): 185-189, at p. 185. Arnheim, N.; White, T.; and Rainey, W. "Application of PCR: "Organismal and Population Biology." *Bioscience* 40(1990):174-182, at p. 174.

[38] Holding, C.; and Monk, M. "Diagnosis of Beta-Thalassaemia by DNA Amplification in Single Blastomeres from Mouse Preimplantation Embryos." *Lancet* II (1989): 532-535. Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349.

have allowed scientists to ask and answer questions concerning human existence and development at the most basic level. The technology is directly applicable in determining genetic uniqueness, to search for evidence of genetic diseases, to observe human development at a molecular level, to determine (well in advance of gross anatomical observation) the sex of the person and, most recently, to determine paternity. This is done through the analysis of human genes.

2. THE LIFE OF EACH PERSON BEGINS AT CONCEPTION.

(a) *Recent Developments and Discoveries in the Science of Genetics Support the Conclusion that the Life of a Human Being begins at Conception.*

All of the genetic information and material necessary and sufficient for a particular human being exists at the moment human life begins at conception. When the head of the male sperm penetrates inside the female's ovum is the precise moment when the genetic information for the complete development of a unique individual human being is present. The information carried by the father encounters in the same recipient cell the information carried or transmitted by the mother so that suddenly, almost instantaneously, a new constitution is spelled out in genetic terms and everything that is necessary to be a human being is present

immediately after conception.[39] Either the whole information is present for conception of a human being for development to full stages of human growth, after the moment of the entry of the sperm into the ovum, or the genetic information is insufficient and no human being shall develop and conception will fail.[40] Not only is it possible to identify the resultant cell after conception as being human, the individual entity is known and can be identified.[41] This new constitution is complete in all of itself, and is capable of being identified, capable of being read, and the makeup of

[39] See testimony of Dr. Jerome LeJeune (hereinafter "LeJeune") 23a, a world renowned geneticist who provided testimony which is made part of the record of the present case. at 26a, 27a. See n.4 at p. 4 above. See also, Moore, K.L., *Before We Are Born*, W.B. Saunders (1989) p.25, 26; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; see also, authorities cited in Appendix A attached to this brief.

[40] LeJeune, 23a; Volpe, E.P., *Seeds of Life, In Biology and Human Concerns* (1983), Stout, J., 3rd Ed. Wm. C. Brown Co., p.18-20; Gilbert, S.F., *Developmental Biology*, Sinauer Ass. Inc., 1985, p.32-37, 58-63; Oppenheimer, S.B., et al. *Introduction to Embryonic Development*, 1989, Allyn and Bacon; Editorial Production Service, Lifland, et al. Bookmakers, p.20-60; Bernstein, R. et al. *Biology: The Study of Life* (1982), Harcorth, Brace, Jocvanovick, Inc. p. 584.

[41] LeJeune at 24a.

chromosomes complete. We have, in short, a human being immediately after conception.[42]

Within the process of fertilization is an extraordinary device employed by nature to protect the privacy of the life of the person immediately after conception - as if the right of privacy is written into the law of nature. The egg, a little sphere of one and one-half millimeters in diameter is protected by a transparent membrane (the zona pellucida) which completely covers the egg. Immediately upon a single sperm burrowing inside the zona pellucida, the transparent membrane suddenly becomes physically changed and within microseconds becomes completely impenetrable by any other sperm.[43]

The necessary genetic information to create a human being is created in DNA, a long molecule. Physically, it is analogous to a minute flat ribbon of tape that is used in a tape recorder. Inside the head of a sperm is a long thread of one meter or so which is so tightly coiled in twenty-three little pieces that the whole of its volume can be put on the point of a needle. It contains twenty-

[42] LeJeune at 24a; Moore, *supra*, 26-28; Volpe, *supra*, 18-20. See also authorities cited in Appendix A to this brief.

[43] LeJeune at 24a.

three chromosomes. The ovum also contains twenty three chromosomes. In addition, inside the ovum there are billions of molecules specialized which will recognize and be recognized by the signals given by the RNA in protein constituting the genetic makeup. The information provided by the male sperm is approximately fifty billion bytes of information.[44]

The interaction of the biological components can be analogized to the process of a tape recorder which plays music. When a mini cassette on which the music of an artist such as Mozart is recorded and placed into a tape recorder, one experiences the sound of a symphony. The tape itself has no notes or music, and there are no musicians. Because there is a special code written on the tape, information is conveyed in such a way that the tape recorder will read it and make air move through a loud speaker. What is experienced by a listener is not an orchestra, not musicians, not evidence of music, but the genius of the author. That is how life is played: inside the egg which receives the tape band from the father which has its own tape bands, there forms a sort of table or law of life. Within the egg is a tremendous amount of information

[44] LeJeune at 25a.

to be received and interpreted. The genetic information necessary to form the completed human being is not only the long ribbon of DNA (which through the analogy is the mini cassettes of the symphony), but information in the cell itself, which reads it. The cell is an analogous to the magnetiscope of the tape recorder and possesses within it enormous information.[45]

Methylation of cytosine represents a very recent discovery which supports the conclusion that a human being is a complete person upon conception. It's significance was unknown four or five years ago. Recently discovered is that DNA is even more sophisticated than previously suspected and the messages are written letter by letter, piece by piece. DNA contains basic information with indications that some information must be read immediately and some at a later time. What is meant by the methylation process is that everything to make a particular human being exists at fertilization but is not read at the instant of conception. This discovery was never expected ten years ago and was never predicted: that, in fact, the father's genes underline instructions to immediately produce the membranes inside which the

[45] LeJeune at 25a, 26a.

embryo will develop itself and to make the placenta which is the organ by which it will take the nutrients from the vessels of the mother. That information is contained or underlined in the sperm, not in the mother's egg. The male genetic material, therefore, builds the membranes which becomes the shelter in the placenta which is the food gathering system. The female information acting in concert with the male information, provides the mechanism for the development of the parts of the physical anatomy.[46] All of this information and the sophisticated directed mechanisms is contained in the first cell. The significance of this information is the discovery that disproved there can be a genetic constitution made from one parent only. It is possible to combine the pronuclei of one parent, but it will not develop. The reason for this is because the pronuclei of the sperm and the pronuclei of the egg must have two separate functions and contributions to the development process of a human. On a rare occasion, a sperm will fertilize an egg with no pronucleus. The sperm will duplicate its chromosomes to 46, but this zygote cannot develop -- it is simply not a human

[46] LeJeune at 27a to 28a.

being.[47] It is absolutely required that in the first cell, there be the DNA underlined by methylation both in the male way and DNA methylation in the female way. The extraordinary observation made is that there is only one cell in all of the life of a person in which those two methylation systems from father and mother are present inside a cell unaltered. It is the very first cell which gives life to a person. At each progressive stage of development this methylation is erased and replaced and progressively cells learn by a cascade of reaction to specialize so that some cells will develop to form the brain, another to make the liver, another to make bone, etc. It has been learned, for instance, that the male way of "spelling" is obligatory for muscles, so that even in the female information from which muscles are built to be underlined in a paternal way. This understanding contradicts previous notions that fetal development occurs only through the mother. The child is a complete human being programmed for life from conception.[48]

[47] Gilbert, S.F. *Developmental Biology* Sunderland, Mass.: Sinaver Associates Inc., 1985, at p. 61.

[48] LeJeune 27a to 29a. Chaillet, J.R.; Vogt, T.F.; Beier, D.R.; and Leder, P. "Parental-Specific Methylation of an Imprinted Transgene is Established During Gamestogenesis and Progressively Changes During Embryogenesis." *Cell* 66(1991): 77-83. Surani, M.A.H.; Barton, S.C.; and Norris, M.L. "Nuclear Transplantation in the

The essence of the human being is complete.[49] There exists a consensus within the scientific and medical communities concerning the facts which form the basis for this conclusion.[50]

Present developments in technology have disclosed other discoveries which support the conclusion that a human being is genetically complete at the moment of conception.

Approximately six years ago an Englishman, Alec Jeffreys, discovered and developed a technique which has the capabilities of determining the identity of a particular human being. Jeffreys discovered that, in part of the chromosomes, the DNA is repetitive. It can be repeated as much as one hundred times. This region of DNA can be used to make a genetic "fingerprint" of each individual human being. Much like a bar code in a store uniquely identifies a product, this fingerprint uniquely identifies an individual and can

Mouse: Heritable Differences Between Paternal Genomes after Activation of the Embryotic Genome." *Cell* 45(1986): 127-136. Swain, J.L.; Stewart, T.A.; and Leder, P. "Parental Legacy Determines Methylation and Expression of a Cutosomal Transgene; A Molecular Mechanism for Paternal Imprinting." *Cell* 50(1987):719-727, at p. 719.

[49] LeJeune 28a to29a.

[50] See discussion, p. 37 to 40 and authorities cited in Appendix A attached to this Brief.

be "read." Jeffreys developed a method of extracting DNA and a technique for examining it. The technique creates the ability to record unique traits of the individual being examined. Jeffreys' method can be used to prove that each person is unique and that the sequence of the bars that he is able to identify is absolutely typical of and specific to the person being examined, and is termed a "fingerprint" of DNA.[51]

As it relates to human development, the Jeffreys technique has been applied to determine if two samples containing genetic material (DNA) are from the same organism. For example, the technique can be used to determine that the developing human, after fertilization, is genetically distinct from its parents. The techniques have also been used to determine if cells from unique organisms, an example is a parent and its child, are genetically

[51] LeJeune at 26a to 27a; Jeffreys, et al. *DNA Fingerprints and Segregation Analysis of Multiple Markers in Human Pedigrees*, Am. Journal of Human Genetics, 39:11-24 (1986); Honma, M., et al. *Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing*, Human heredity, 1990, 40:p356-362; Jeffreys, A.J., et al., *Principles and Recent Advances of Human DNA Fingerprinting*; DNA Fingerprinting: Approaches and Applications, edited by Jeffreys (1991).

related.[52] The whole field of DNA fingerprinting as applied in court cases and in paternity (and for that matter maternity) questions is the direct result of this technology. The use of DNA fingerprinting in these types of questions is based upon the scientific fact that the DNA fragments found in a child's DNA fingerprint are always approximately equally divided between those of maternal and paternal origin.[53]

The technique has also been successfully used in determining the paternity of the developing child in a case of consensual sex with two male partners, where the mother had decided to deliver the child if one man was the father and to abort the child if the other man was the father. The technique was also used in a rape case to determine if her husband or an unknown rapist was the father. Tests were performed on the fetus at 16 weeks gestation in the first case and at 9 weeks gestation in the rape case. Paternity was established with a certainty of 68 trillion to one in

[52] Jeffreys, A.J.; Brookfield, J.F.Y; and Semeonoff, R. "Positive Identification of an Immigration Test-Case Using Human DNA Fingerprints." *Nature* 317 (1985):818-819, at pp. 818-819.

[53] Honma, M.; and Ishiyama, I. "Application of DNA Fingerprinting to Parentage and Extended Family Relationship Testing." *Hum Hered* 40(1990): 356-362, at p. 356.

the first case and at a certainty of 360 trillion to one in the rape case (unless the rapist was the father's identical twin). The authors conclude that molecular genetic fingerprinting is "... ideally suited to address questions of familial relationship in the prenatal period."[54]

The procedure also established the existence of a unique human being other than the mother at the time of the tests.

The technologies of molecular biology have recently begun to find application in the detection of fetal abnormalities and fetal sex determinations through the analysis of the very small number of fetal cells that have found their way into the mother's bloodstream (about 1 cell in 10 to 100 million blood cells of the mother).[55] Using cell sorting technology (another post 1973 development) and DNA probe technology, scientists have been able to determine, for example, the presence of a growing boy or girl from a sample of

[54] Kovacs, B.W.; Shahbahrami, B.; Medearis, A.L.; and Comings, D.E. "Prenatal Determinations of Paternity by Molecular Genetic "Fingerprinting." *Obstet Gynecol* 75(1990): 474-478, at pp. 474-475.

[55] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cymetry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

4 ml of the mother's blood.[56]It is an established principle of human genetics and heredity that an individual human's cells all contain the same DNA composition (except for sperm and ovum cells)[57] such that in this case the few fetal cells that have found their way into the mother's bloodstream reflected accurately the presence of the unique human sharing the mother's space when the mother's blood was tested.

"The ability to detect genetic disorders before birth has improved dramatically during the last two decades."[58]

The application of deoxyribonucleic acid (DNA) techniques to prenatal diagnosis of certain single gene disorders was first introduced in 1976. DNA-based tests were first applied on a practical basis for the prenatal diagnosis of alpha-Thalassemia in

[56] Price, J.O.; Elias, S.; Wachtel, S.S.; Klinger, K.; Dockter, M.; Tharapel, A.; Schulman, L.P.; Phillips, O.P.; Meyers, C.M.; Schook, D.; and Simpson, J.L. "Prenatal Diagnosis with Fetal Cells Isolated From Maternal Blood by Multiparameter Flow Cytometry" *Am J Obstet Gynecol* 165(1990): 1731-1737, at p. 1731.

[57] Oppenheimer, S.B.; and Lefeure, G. Jr. *Introduction to Embryonic Development* Allyn and Bacon 1989. (pp. 20-60) at p. 53. Papalia, D.E.; and Okls, S.W. *A Child's World: Infancy Through Adolescence*. New York: McGraw-Hill, Inc., 1979, at p. 51.

[58] Hogge, W. A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

1978, sickle cell anemia in 1978, beta-thalassemia in 1980, hemophilia A in 1985, hemophilia B in 1984, phenylketonuria in 1985, Duchenne and Becker muscular dystrophy in 1985, cystic fibrosis in 1986, and Huntington's disease in 1986. This list provides "an indication of the explosion of knowledge and new diagnostic possibilities that have recently occurred.[59]

Another major advancement has been the use of chorionic villus sampling. It was only in 1982 that its potential use in determining genetic disorders was realized. In less than five years, this technique has been widely substituted in place of amniocentesis. Due to the fact that trophoblastic tissue has the same "genetic constitution" as the fetus, a sample from the chorionic villi reflects the chromosomal, biochemical, and DNA status of the fetus. Therefore, the production of trophoblastic tissue is controlled by the DNA of the developing fetus and not

[59] Boehm, C.D. and Kazazian, H.H. Jr., "Prenatal Diagnosis by DNA Analysis" In *The Unborn Patient* 2nd ed., edited by Michael R. Harrison et al., 82-91 at 82. Philadelphia: W.B. Saunders Company, (1991).

that of the mother. This procedure uses tissue collected in the first trimester of life.[60]

The techniques involved in the generation of "in vitro" fertilization, commonly called test tube babies, the first born in 1973, argue that the product of test tube conception is a unique human being. Before implantation the new living being is clearly separate from its mother. During the period after fertilization and before implantation, it has been possible to determine the sex of the human, whose development is started by a clear physical separation from the mother and father.[61] The preimplantation diagnosis of certain genetic diseases has also been considered a feasible medical advance.[62] Neither of these procedures makes much sense if the pre-implanted human embryo is not a genetically unique human.

[60] Hogge, W.A. "Chorionic Villus Sampling" In *The Unborn Patient* 2nd ed. edited by M.R. Harrison et al., 53-57. Philadelphia: W.B. Saunders Co., 1991, at p. 53.

[61] Handyside, A.H.; Pattinson, J.K.; Penketh, R.J.A.; Delhanty, J.D.A.; Winston, R.M.L.; and Toddenham, E.G.D. 1989. "Biopsy of Human Preimplantation Embryos and Sexing by DNA Amplification." *Lancet* I (1989):347-349, at p. 348.

[62] Monk, M.; and Holding, C. "Amplification of a Beta-Haemoglobin Sequence in Individual Human Oocytes and Polar Bodies." *Lancet* 335(1990): 885-987, at 985.

The goal in the study of human embryo viability in synthetic culture medium is improved development and pregnancy success. Recently an embryo derived platelet activating factor was discovered, which when added to growth media, has dramatically increased the developmental and pregnancy potential of the embryo.[63] This chemical, a product of the new human, supports the conclusion that, even before implantation, there is an independent, unique human capable of producing substances that enhance its own survival.

A description of the fetus as a part of a woman's body has been an attractive argument for those who see the fetus as not a unique human. Presumably as a part of the mother's body the fetus' growth and development would be subject to genetic control by the mother. However, using modern molecular biology technology, not available in the 1970's, it has been found that by

[63] O'Neill, C. "A Consideration of the Factors Which Influence and Control the Viability and Developmental Potential of the Preimplantation Embryo." *Baillieres Clin Obstet Gynaecol* 5(1991): 159-178.

the third cell division after fertilization control of growth and development has been established by the new human's DNA.[64]

(b) *There is a consensus within the scientific and medical communities concerning the critical biological and genetic facts which are pertinent to when the life of a person begins.*

The defendant V.C. claims, to support her contention that the child should not enjoy constitutional rights prior to birth, that, "there is no consensus in the scientific community that life begins at conception." (See Affidavit filed by Defendant at 84a to 85a.)

This statement concerning a lack of scientific consensus is intended to argue that the truth about human life cannot be determined, and therefore, no attempt should be made. This claim is false, and the incorrect nature of it serves to demonstrate the validity of plaintiff's point that the time has arrived for a reexamination of the underlying question of *Roe* (when life begins) and whether a child enjoys rights at any time before birth, under the state or federal constitutions.

[64] Telford, N.A.; Watson, A.J.; and Schultz, G.A. "Transition From Maternal to Embryonic Control in Early Manmalian Development: A Comparison of Several Species." Molecular Reproduction and Development 26(1990): 90-100, at 92.

Respondent relies upon an affidavit of one Michael V.L. Bennett, dated May 15, 1990, to support her contention that there is no consensus that life begins at conception (83a to 90a).[65] This affidavit relies upon testimony of Dr. Leon Rosenberg and Dr. Joseph Boyle given eleven years ago in 1981 before the Subcommittee on Separation of Powers of the Judiciary Committee of the U.S. Senate (Human Life Bill, S. 158, 97th Cong., 1st Sess.).

It is pertinent that there is no serious dispute or lack of consensus concerning the important scientific and medical facts relevant to when life begins. It is appropriate to first examine the defendant's statement and then examine the consensus on the facts.

Respondent relies on Dr. Rosenberg's 1981 statements to support the contention that there is no scientific consensus on when life begins (84a (par. 3) to 85a (par. 5)). Defendant, however, avoids mention of the fact that the subcommittee, before whom Dr. Rosenberg testified, published a report which specifically found, as a matter of scientific fact, that life begins at conception:

[65] This affidavit was first made part of the record in this case on March 22, 1992 before the New Jersey Supreme Court. The defendant has referred to it in court papers ever since.

> The testimony of these witnesses and the voluminous submissions received by the subcommittee demonstrate that contemporary scientific evidence points to a clear conclusion: life of a human being begins at conception ... today the facts are beyond dispute.
>
> Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ... there is overwhelming agreement on this point in countless medical, biological, and scientific writings.[66]

Further, the report singled out Dr. Rosenberg for comment, observing:

> It may at first seem difficult to reconcile how the existence of such a broad consensus with the testimony of some witnesses opposing S-158 before the Subcommittee who emphatically denied that it is possible to determine when a human life begins. If the facts are so clear, it is crucial to understand how, for example, one like (Dr. Leon Rosenberg) could say that he knows of no scientific evidence that shows when actual human life exists.
>
> Such statements appear on the surface to present a direct contradiction to the biological evidence discussed above. The explanation of this apparent contradiction lies in existence of the two distinct questions identified above, the scientific question and the value question. We must consider not only whether unborn children are human beings, but also whether to accord their lives intrinsic worth and value equal to those of other human beings. The two questions are separate and distinct. It is a scientific question whether an unborn child is a human being, in the sense of a living member of the human species. It is a value question whether the life of an unborn

[66] Report on Human Life Bill, Subcommittee on Separation of Powers, Committee on the Judiciary United States Senate (97th Cong., 1st Sess. 1981) p. 7.

> child has intrinsic worth and equal value with other human beings.
>
> Those witnesses who testified that science cannot say whether unborn children are human beings were speaking in every instance to the value question rather than the scientific question. No witness raised any evidence to refute the biological fact that from the moment of human conception there exists a distinct individual being who is alive and is of the human species. No witness challenged the scientific consensus that unborn children are 'human beings', insofar as the term is used to mean living beings of the human species.[67]

The Subcommittee report identifies Dr. Rosenberg, by name, as one who adopted an unreal and untruthful approach to the question by deciding that whether the unborn child is not a person is simply a matter of definition, not a question of fact, and the definition can be defined anyway one wishes [without regard to fact]. Only by adopting this approach could Dr. Rosenberg state that he "knows of no scientific evidence showing when actual human life exists." The Subcommittee noted that "he was speaking only to the value questions ...".[68]

The plaintiff has searched the literature with the aid of medical and scientific experts, and is unable to find a single modern

[67] Report on Human Life Bill, *supra*, at 10, 11.

[68] Report on Human Life Bill, *supra* at 11, 12.

reference in the scientific literature which refutes the statement that humans are genetically distinct and complete from their parents at the moment of conception, and that they are anything other than human. The scientific literature is replete with clear statements that human life begins at conception.[69]

3. THE EARLY DEVELOPMENT OF THE HUMAN BEING: *THE UNBORN CHILD CAN EXPERIENCE PAIN AS EARLY AS EIGHT TO ELEVEN WEEKS AFTER CONCEPTION.*

   (a) *The Stages of Growth of the Unborn Child is a Seamless Continuum from Conception to Birth; Advances in Medicine Pertinent to the legal Inquiry.*

The english language is burdened with terms developed at times in the history of medicine when it did not possess the current level of knowledge. But the "stages of growth and development" of the new human being is a "seamless continuum".[70] Immediately upon conception the "fertilized egg" has been referred to as the zygote. At three days the child has developed from a single cell to a sixteen cell individual termed "morula". The term

[69] Plaintiff has compiled a partial list of quotations from scientific and medical journals that make the clear statement that life begins at conception. The list is found at the end of this brief and entitled "Appendix B."

[70] See testimony of Dr. Bernard Nathanson at 43a-44a; see n.5 at p. 5, above; 59a to 66a.

"embryo" connotes the developing human being from the morula stage to about the end of the eighth week. The term "fetus" is used to describe the stage of the development from the end of the eighth week up to the time that the baby is actually delivered whatever the age of the child at birth. The terms zygote, morula, embryo and fetus are only terms of development of the same human being just the same as the terms "infant", "child", "adolescent" and "adult" also describe different stages of development of the human being.[71]

The child is always a separate individual from the mother. Circulations are always separate and the mother and fetus can even have two different blood types.[72] If the blood circulations do in fact mix, it could be lethal for the baby and even for the mother. This relationship is clearly disclosed by developments in immunology. The white blood cells in the immune system of the mother are capable of recognizing and distinguishing the mother from the child. That is the principle reason why the immune system does not kill the organs of the mother. The white blood

[71] Nathanson at 44a.

[72] Clark, J., ed. *Genetics and Heredity: The Blueprints of Life. The Human Body*. Torstar Books Inc., 1985, at p. 9.

cells actually recognize parts of the mother as being her body. It also distinguishes a body that is not part of itself. If a foreign substance enters a person's body the white blood cells recognize it and immediately attack to expel it. When pregnancy progresses and the blastocyst implants, (when the child is eight or nine days old), chemical messages are sent to various systems in the mother and the immune system (the white blood cells included) galvanizes because it recognizes that there is a foreign body within the mother. A concerted immune attack is focused on the new human being and the objective of the immune system is to expel the foreign body. The unborn baby erects a defense against the attack. The trophoblast which constructs the placenta serves as an immunological wall. Most human beings survive the attack of the mother's immune system. Those which do not survive are expelled, which are referred to as "spontaneous miscarriages".[73]

(b) *Based upon New Scientific and Medical Information, the Unborn Child Experiences Pain During Abortion even as early as Eight or Nine Weeks After Conception.*

[73] Hedge, U.C. "Immunomodulation of the Mother During Pregnancy." *Med Hypothesis* 35(1991): 159-164, at p. 159. Nathanson, at 46a to 48a.

(i) Introduction

Dr. Bernard Nathanson has expressed the opinion that the unborn child experiences excruciating pain during abortion. A vivid description which Dr. Nathanson claims supports this conclusion is incorporated in a film of an actual abortion entitled "The Silent Scream" made in 1984. Recent discoveries discussed below, now provide scientific data and information which supports that contention. Dr. Nathanson describes the film of an abortion of a child at the stage of eight weeks through the use of ultrasound technology. In the abortion, the doctor puts an instrument into the womb to dilate the cervix, the water is broken and the embryonic fluid is permitted to flow out. Then the doctor inserts a suction apparatus into the uterus. It can be seen that the baby moves away from the suction apparatus. The suction is turned on and a tremendous negative force is used to pull the baby from its living quarters. In the suctioning process, the arms and legs of the human being are being torn off and then subsequently the body is being ripped apart. Dr. Nathanson explained that the head of the baby was too large to be suctioned out so the doctor took a polyp forcep to reach into the uterus to locate the baby's head and put the forcep around it and then close the forceps. The film,

according to Dr. Nathanson, reveals that the child's head is actually crushed in the process. It is Dr. Nathanson's opinion that an abortion of an unborn child in the mother's womb subjects the human being to unimaginable agony and it ends the life of a person in a barbaric and bloody manner. In the film it can be seen, according to Dr. Nathanson, that the mouth of the young unborn baby is open. It is described as a dramatic, arresting moment and heart stopping moment. It can be seen that the child was grimacing and was evidencing pain and agony.[74]

Studies being conducted as a result of the availability of new technology has resulted in data and information which supports the conclusion that the unborn child is subjected to great pain when an abortion takes place in the third trimester, and the unborn child experiences pain even as early as eight or nine weeks after conception.

(ii) The New Technology

Development of the post 1973 techniques of monoclonal antibody production, first described in 1975 using mouse material and then further developed to allow the production of specific

[74] Nathanson at 48a to 50a.

human antibodies in the early 1980's[75], has complemented DNA and RNA studies which are the subject of Molecular Biology, by allowing for the specific detection and location of individual proteins or peptides in a human cell sample.

The use of monoclonal antibody technology[76], as well as recent developments in modern protein chemistry and electrophysiology, are being applied to questions relevant to human developmental neurobiology. Initially applied in the mid 1980's, the power of the new techniques was recognized as having the potential to revolutionize our understanding of the human nervous system at it's inception. Scientists recognized that with the new technology they could investigate nervous system function and development at the molecular or chemical level. They were no

[75] Martinis, J.; David, G.S.; Bartholomew, R.M.; and Wang, R. "Novel Applications of Monoclonal Antibodies." In *Basic Biology of New Development In Biotechnology In Basic Life Sciences* 25(1983): 129-154, at pp. 129-130. Cole, S.C.P.; Campling, B.G.; Atlaw, T.; Kozbor, D.; Roder, J.C. "Human Monoclonal Antibodies." *Mol Cell Biochem* 62 (1984): 109-120, at p. 109.

[76] Campbell, A.M. "Monoclonal Antibody Technology" In *Laboratory Techniques and Biochemistry and Molecular Biology*, edited by R.H. Burdon and P.H. Van Knippenberg. Eisevier (Amsterdam), 1985

longer limited to observations of the histological presence of nerves and other gross functionality to learn more about the human nervous system. From the start, the early results of this technological application were to show that the classical histological and functional criteria for defining (nerve) cell types was oversimplified.[77]

One outstanding discovery in the field of neurobiology since 1973 was the detection of some 30 neuropeptides (or nerve hormones) directly involved in the functioning nervous system of the human body. The presence of peptides (the hormones) of the endocrine system were known in 1973; but since 1973 similar substances have been found to be present in nerve fibers. This discovery, which identified more than 30 neuropeptides, was described in 1985 as a recent and revolutionary discovery.[78] These neuropeptides function as neurotransmitters and neuromodulators which are located at axon terminals at synapses

[77] Fischbach, G.D. "An Introduction to Molecular Approaches in Studies of Neuronal Development and Synapse Formation." In *Molecular Neurobiology* In *Neurology and Psychiatry*, edited by M.D. Erich, R. Kandel. New York: Raven Press, 1987.

[78] Ballesta, J.; Bloom, S.R.; and Polak, J.M. "Distribution and Localization of Regulatory Peptides." *Crit Rev Clin Lab Sci* 22(1985):185-218, at pp. 185-186.

throughout human tissue. Two of the neuropeptides that are of particular relevance to this discussion are substance P (the chemical messenger of pain) and enkephalin (a neurotransmitter involved in pain perception).[79] The detection of these two neuropeptides in samples of human tissue has been used as a convenient way to define and locate nervous system development and function in the human being from the time of conception. In 1985, the study of neuropeptides was still in its infancy, but due to the field's accelerated pace of study, the results to date point to a very complex process of interacting peptides, neurons, and ion channels which play an important role in the detection and transmission of sensation in the human. Their discovery was a direct result of new immunocytochemical techniques used in conjunction with radioimmunoassay, neither of which were available in the 1970's.

The crude ultrasound devices that were available in the early 1970's permitted limited access to knowledge of a child during the early stages of growth. "Real time ultrasound" was developed in 1976 and actually created a motion picture which could depict

[79] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, at pp. 152-154.

movement and function such as breathing, urination, swallowing and other functions of the human existence. This level of visualization permits diagnosis of the child's illnesses while in its mother's womb. Medicine can now watch how the child functions including such intricate detail as the operation of the tiny little valves of the heart as it flops up and down pushing blood. Abnormalities in things such as heart valves can be detected and rather sophisticated operations are currently performed on unborn children at four to five months.[80]

First pioneered in 1981, fetal surgery has made dramatic advances. Both mother and fetus are anesthetized, the mother's abdomen surgically opened and the uterus incisioned. While still attached to the umbilical cord, amniotic fluid is drained off, and "the surgeon removes the fetus' left arm from the uterus and attaches specially designed fetal monitors."[81] These fetal monitors are for ECG, transcutaneous oxygenation, and temperature readings. The baby is incised surgically, repaired, and is placed back into the mother's uterus. The uterus is filled with

[80] Nathanson at 44a to 45a.

[81] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30.

warm lactated Ringer's solution and prophylactic antibiotics to replace any lost amniotic fluid.[82] Fetal heart rate and oxygen saturation monitoring is a norm in these procedures.[83] Some defects that might require this procedure include urethral obstruction, congenital diaphragmatic hernia, fetal chylothorax, sacrococcygeal teratoma (a fetal tumor).[84] After surgery, the child can proceed through pregnancy to, at, or near full term.[85] During the fetal surgery the baby is treated like an adult patient, and must be anesthetized to reduce pain.[86]

Medicine has also recently developed the electronic fetal heart monitor which permits sophisticated investigation of the fetus.

[82] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Nathanson at 52a.

[83] Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49.

[84] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[85] Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413. Nathanson at 46a.

[86] See discussion on fetal pain found below at p. 62-63.

The electronic fetal heart monitor tracks the fetal heart rate from moment to moment and it can detect reactions of the unborn child to such things as different types of music.[87] The child functions in a very human way, excretes urine, and its heart beats regularly (since three weeks).

(iii) *Assumptions About Pain.*

Since the time of *Roe v. Wade* there have been a number of generally accepted assumptions about human neurological development and our ability to feel pain that have been refuted. The first assumption was that neonates were incapable of feeling pain.[88] The second assumption was that myelinated nerve fibers were necessary for pain perception, and since they did not form completely until after birth pain perception was a late developmental event. The third assumption was that pain experience required pain detecting nerves connected to the thalamus and then to the brain cortex; furthermore there was presumed to be a period of cortical maturation necessary before pain could be experienced. All of these assumptions were based

[87] Nathanson, at 46a.

[88] Porter, F. "Pain in a Newborn," *Neonatal Neurology, Clinics in Neonatology,* 16(2) p. 549 et seq. (1989).

upon gross histological observations. Those making such assumptions did not know about neuropeptides and their detection and function. They also did not have available the modern methodologies and techniques developed in the last decade.

It was only in the last decade that the traditional concept accepted at the time of *Roe*, that even normal neonates cannot feel pain, was first challenged.[89] It had been assumed by the medical community that a fully developed and mature cortical brain region was necessary for pain perception. This assumption, it became clear, was inconsistent with the observations of care givers for premature infants.[90]

[89] Fitzgerald, M.; and McIntosh, N. "Pain and Analgesia in the Newborn." *Arch Dis Child* 64(1989): 441-443, at p. 441.

[90] One of whom stated eloquently,

> "It has generally been assumed that the ability of a child to feel pain increases with age and that neonates may not perceive pain or may perceive it only minimally. Assumed by whom? Certainly not by those of us at the bedside of critically ill infants, who see them flinch from procedures, startle in response to loud noises, and turn from bright lights and various other forms of stimulation. Not by those who have heard infants' anguished cries and seen their vigorous withdrawals from painful stimuli. Not by those who have observed their increased heart and respiratory rates and profuse sweating in response to heel sticks or circumcision. And finally, not by those who have seen babies gasp for every breath as they die from incurable lung disease."

Biochemical studies supported the observations of care givers concerning pain experiences. Studies on unborn and premature infants pushed back the developmental time when pain was experienced. Detailed hormonal studies in preterm neonates undergoing surgery under minimal anesthesia have shown marked release of catecholamines, as well as autonomic nervous stimulation, heart rate changes, increased hormonal activity and increased motor activity. These activities are consistent with stress experienced with pain.[91] It has been documented that endocrine and metabolic responses associated with pain are abolished by giving anesthesia to preterm neonates[92], and to the fetus.[93]

Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1347.

[91] Rosen, M.A., *Anesthesia for Procedures Involving the Fetus* (1991), Seminars in Perinatology 15:410-417.

[92] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320. Rosen, M.A. "Anesthesia for Procedures Involving the Fetus." *Semin Perinatol* 15(1991): 410-417, at p. 431.

[93] Levine, A.H. (1991), Fetal Surgery, *Aorn J*, V54(1): 16-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., (1991), Harrison (editors), W.B. Saunders Co. p. 176, at p. 176.

Based upon this and other studies standard medical practice changed. A New England Journal of Medicine editorial stated:

> Any decision to withhold anesthetic agents ought not to be based on the infant's age or *perceived degree of cortical maturity*; it should be based upon the same criteria used in older patients."[94] (Emphasis added).

In the current state of medicine, with operative procedures being performed on premature babies as early as four months, it is a standard medical practice, to anesthetize the child (at any age).[95] Anesthesia is used on fetuses in operations because of the premature children's experiencing of pain.[96]

(iv) *The Need to Relieve Pain During Fetal Surgery.*

Since 1981, fetal surgery has become a reality. Both mother and fetus are anesthetized, the mother's abdomen surgically opened and the uterus incisioned. While still attached to the

[94] Fletcher, A.B. "Pain in the Neonate." *N Eng J Med* 317(1987): 1347-1348, at p. 1348.

[95] See Porter, F., *Pain in a Newborn*, Neonatal Neurology, Clinics in Neonatology, 16(2) p.549 et seq. 1989. For general discussion of current medical practice for pain relief for neonates see: Choonara, I, *Management of Pian in Newborn Infants*, in Seminars on Peranotology, 16(i):32-40 (1992); Malhortora, N., L. Han, *Privilege of Analgesia in the Neonate*, in Seminars in Perinatology, 15(5):418-422 (1991).

[96] See discussion below under subsection (iv)(fetal surgery).

umbilical cord, amniotic fluid is drained off, and "the surgeon removes the fetus' left arm from the uterus and attaches specially designed fetal monitors."[97] The baby is incised surgically, repaired, and is placed back into the mother's uterus. Fetal heart rate and oxygen saturation monitoring is a norm in these procedures.[98] After surgery, the child can proceed through pregnancy to, at, or near full term.[99]

It is common practice to monitor fetal vital signs and to give the fetus anesthesia.[100] "Although the mother is anesthetized for

[97] Levine, A.H. "Fetal Surgery." *Aorn*, 54(1991): 17-19, 22-27, 30-32, at p. 30.

[98] Harrison, M.R.; Langer, J.C.; Adzick, N.S.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Rosen, M.A.; Callen, P.W.; Goldstein, R.G.; and deLorimier, A.A. "Correction of Congenital Diaphragmatic Hernia In Utero, V. Initial Clinical Experience." J Pediatric Surg 25(1990):47-57, at p. 49.

[99] Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient." *Mayo Clin Proc* 66(1991): 411-429, at p. 413. Nathanson 46a.

[100] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 30. Harrison, M.R.; Adzick, N.S.; Longuker, M.T.; Goldberg, J.D.; Rosen, M.A.; Filly, R.H.; Evans, M.I.; and Golbos, M.S. "Successful Repair in Utero of a Fetal Diaphragmatic Hernia After Removal of Herniated Viscera from the Left Thorax." *N Eng J Med* 322(1990): 1582-1584, at p. 1582. Strickland, R.A.; Oliver, W.C.; Chantigian, R.C.; Ney, J.A.; and Davidson, G.K. "Anesthesia, Cardiopulmonary Bypass, and the Pregnant Patient."

fetal surgery, the fetus becomes the prime target for the anesthesia."[101] "For fetal surgery, unlike maternal surgery, the fetus is not an innocent bystander for whom we attempt the least anesthetic interference. Instead, the fetus is the primary patient, requiring safe administration of anesthesia and close monitoring of anesthetic effects to ensure well being."[102] Studies indicate that performing surgery on unanesthetized fetuses results in automic nervous system stimulation, increased hormonal activity, increased

Mayo Clin Proc 66(1991): 411-429, at pp. 414-415. Longaker, M.T.; Golbus, M.S.; Filly, R.A.; Rosen, M.A.; Chang, S.W.; and Harrison, M.R. "Maternal Outcome After Open Fetal Surgery." *JAMA* 265(1991): 737-741, at p. 737. Harrison, M.R.; Golbus, M.S.; Filly, R.A.; Anderson, R.L.; Flake, A.W.; Rosen, M.; and Huff, R.W. "Fetal Hydronephrosis: Selection and Surgical Repair." *J Pediatr Surg* 22(1987): 556-558, at p. 556. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176; Strickland, supra, at 411.

[101] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. See also, Strickland, supra, at p. 411.

[102] Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

motor activity, and variations in heart rate.[103] Fetal surgery is feasible on an ill patient as early as 18 weeks gestation.[104]

(v) Non Myelinated Nerve Fibers Transmit Pain.

Until recently pain perception was presumed to require myelinated[105] nerve fibers[106] (present later in development). It has also been shown that this is not necessarily the case even in adults.[107] Both myelinated and unmyelinated nerve fibers

[103] Levine, A.H. "Fetal Surgery." *Aorn J*, 54(1991): 17-19, 22-27, 30-32, at p. 27. Rosen, M. "Anesthesia and Monitoring for Fetal Intervention" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison 172-181. Philadelphia: W.B. Saunders Co., 1991, at p. 176.

[104] Harrison, M.; and Adzick, N.S. "The Fetus as a Patient." *Ann Sur* 213(1991): 279-291, at p. 281.

[105] Myelin is the fatty substance that makes up the sheath around many nerve fiber.

[106] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body.* Torstar Books, Inc., 1985, at p. 153.

[107] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322. Casey, K.L. "Neural Mechanisms of Pain: An Overview." *Acta Anaesthesiol Scand* Suppl 74(1982): 13-20, at 13.

transmit pain.[108] Most fibers of the nervous system of a newborn full term infant are not myelinated until two years after birth when the spinal cord, brainstem, and cerebellum are finally myelinated.[109] Myelin is not needed to conduct impulses over the nonmyelinated fibers, but the non-myelinated fibers conduct slower than myelinated ones (but in an infant who is physically smaller than an adult, the impulses do not have as far to travel.)[110] "Even when mature, most peripheral pain fibers are unmyelinated or, at best, thinly myelinated, lack of myelination therefore cannot be used as a valid argument to deny pain appreciation in the newborn."[111] A recent analysis of pain experiences in adults reached the conclusion that the classical view of the nervous system as a hard wired system projecting

[108] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at 1322.

[109] Clark, J., ed. "The Nervous System: Circuits of Communication." *The Human Body*. Torstar Books, Inc. (1985).

[110] Clark, J., ed. *The Nervous System: Circuits of Communication. The Human Body*. Torstar Books, Inc., 1985, p. 109.

[111] Scanlon, J.W.; "Appreciating Neonatal Pain." *Adv Pediatr* 38(1991): 317-333, at p. 320.

from nociceptors (pain detecting nerves) to the thalamus and then to the cortex cannot explain all pain experiences.[112] Thus, this classical view needs to be modified or replaced.

(vi) It is Now Known that Full Cortical Development Is Not Necessary for the Child to Experience and Respond to Pain Prior to Birth.

Citing an old study, defendant claims that cortical synapses and thalamocortical connections are "prerequisites" for neocortical reception of body sensation and these do not begin to develop until the unborn child is 22 to 23 weeks old.[113]

It is well known, however, that the human brain does not reach complete development until adulthood.[114] Putting aside for the moment the evidence that science is now uncovering which

[112] Wall, P.D. "The Biological Function and Dysfunction of Different Pain Mechanisms." In *Advances in Pain Research and Therapy*. Edited by F. Sicuteri, (10:19-28). New York: Raven Press, 1992, at p. 19.

[113] Reference 87a to 88a. It is significant to note that, even the defendant, V.C. must concede that all that is necessary for a person to experience pain is present from the 22nd to the 23rd week of life. Even the pro-abortionists must acknowledge that abortions at that point cause a painful death.

[114] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and Infant." *Lakartidningen* 88 (1991): 1880-1885.

supports the conclusion that the unborn child is capable of experiencing pain long before the twenty-eighth week and as early as the eighth week after conception and that it is current questioned that cortical involvement is necessary for pain perception.[115] The defendant V.C.'s position is that all that is needed for pain perception is present at 26 weeks gestation. Therefore, abortions performed after that point cause a painful death.

As mentioned above however, science has called into question the latest assumption that cortical involvement is necessary for pain detection.[116] Evidence to support the premise that pain can be experienced by us before 26 weeks gestation comes from the early detection of pain associated chemicals; the timing of nerve development; the observation of fetal behavior and the characterization of full term infants with anencephaly.

[115] Boreus, L.O. "Pain in the Newborn - Pharmacodynamic Aspects." *Dev Pharmacol Ther* 15(1990): 142-148, at p. 144. See also discussion at p. 71-73.

[116] Boreus, supra at p. 144.

The discovery of neuropeptides and their function as nerve impulse transmitters and modulators was totally unknown at the time of *Roe v. Wade* and is recognized as revolutionary.

The presence of substance P is a leading indicator of an organ system's ability to detect and transmit pain. The involvement of neuropeptides in pain transmission was not known in 1973. Nor were they part of the discussion when science originally formulated a proposition that there was a need for a sensory cortex for pain perception. Substance P is a pain transmitter and a neuromodulator in the primary cortical areas of sensorial integration.[117] Substance "P" was found to be present in neuronal elements of the human cortex at eighteen weeks gestation (the earliest time point tested).[118] This is significantly earlier than the defendants 26 week claim.

[117] Manolidis, L.; Baloyannis, S.; and Mandolidis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989: 375-382, at p. 375.

[118] Manolidis, L.; Baloyannis, S.; and Mandolis, S. "Substance P in the Acoustic Area of the Cortex During Neuronal Development and Maturation." *Acta Otolaryngol* (stockh) 107(1989): 375-382, at p. 375.

For the existence of pain there presumably has to be an event and detection of that event outside the brain region. It is a very important and recent observation, that, using immunohistochemistry techniques, substance "P" positive neurons and nerve fibers were detected at eleven weeks post fertilization, and enkephalin positive neurons and nerve fibers were detected at thirteen weeks post fertilization. The levels of substance "P" and enkephalin at twelve to fourteen weeks were comparable to levels of the full term baby. In 1990, as a result of this revelation using molecular biological techniques, researchers have stated that:

> "the importance of the early appearance of enkephalin and substance "P" neurons and fibers of the pain pathways in the major subnuclei connecting with the cardiovascular, gastrointestinal and respiratory functions in the human has to be stressed." [119]

None of the significant techniques used in the cited study were available in 1973 or significantly thereafter. Others have found Substance "P" present as early as five weeks gestation and has

[119] Yew, D.T., et. al. *Development and Localization of Enkephalin and Substance P in the Nucleus of the Tractus Solitarius in the Medulla Oblongata of Human Fetuses*, Neuroscience 34(1990) p.491-498, at p. 491.

been detected at all stages of development wherever examined from that point thereafter.[120]

In the last six years modern science has examined the relationship of substance P and pain.[121] It has been found that substance "P" (a neuropeptide), an important excitatory transmitter of pain pathways, is clearly present in the human at five weeks post fertilization.[122] Nervous system development (and function) occurs well before 26 weeks gestation.

If a neocortex is needed for pain detection, then the fact that neocortex development begins at eight weeks gestation in the

[120] Tam, P.K.; and Lister, J. "Maldevelopment of Spinal Cord - Substance P in Spina Bifida." *Z Kinderchir* 41(1986): 206-208. Wadhwa, S.; Rizvi, T.A.; and Bijiani, V. "Substance P-Immunoreactivity in the Developing Human Retinogeniculate Pathway." *Neurosci Lett* 89(1988): 25-30, at p. 25. Paulin, C.; Charnay, Y.; Chayvialle, J.A.; Daniere, S.; and Dubois, P.M. "Ontogeny of Substance P in the Digestive Tract, Spinal Cord and Hypothalamus of the Human Fetus." *Regul Pept* 14(1986): 145-153, at p. 145.

[121] Uddman, R.; Edvinsson, L.; Jansen, I.; Stiernholm, P.; Jensen, K.; Olesen, J.; and Sunder, F. "Peptide-Containing Nerve Fibers in Human Extracranial Tissue: A Morphological Basis for Neuropeptide Involvement in Extracranial Pain?" *Pain* 27(1986): 391-399.

[122] Luo, C.B.; Zheng, D.R.; Guan, Y.L.; and Yew, D.T. "Localization of Substance P and Enkephalin by Immuno histochemistry in the Spinal Cord of the Human Fetus." *Neuroscience* 27(1988): 989-993, at p. 989.

fetus and has all its neurons by twenty weeks is pertinent.[123] Some may assume that a degree of cortical maturity is necessary for pain perception. That assumption led physicians to presume that newborns did not feel pain when Roe v. Wade was decided. Clearly, that assumption was wrong.

Until recently, science was incapable of even formulating questions no less deriving answers concerning the role of chemicals in the transmission of pain. In fact, science had not even discovered the existence of most of those key chemicals when *Roe v. Wade* was determined. A recent review (1991) summarized the current state of understanding of the function and development of the brain in the developing human.[124] There the authors observe:

> "neuronal multiplication occurs mainly from the tenth to twentieth gestational weeks, after which no new nerve cells are formed, though neuronal arborization and the information and reorganization of synapses continues until adulthood...Somatosensory functions are developed at an early stage. The pain threshold is assumed to be lower in

[123] Marin-Padilla, M. "Structural Organization of the Human Cerebral Cortex Prior to the Appearance of the Cortical Plate." *Anat Embryol* 166(1983): 21-40, at p. 21.

[124] Lagercrantz, H.; and Forssberg, H. "Functional Development of the Brain in the Fetus and the Infant." *Lakartidningen* 88(1991): 1880-1885.

> the fetus than in the adult. In man general fetal movements appear from the eighth gestational week and more complex movements such as sucking, swallowing and breathing during the tenth to twelfth gestational weeks. These movements are generated by neuronal networks."[125]

Using modern techniques that were used to identify different types of nerve synapses, as well as different types of neurotransmitters, in samples taken from 8 to 37 week old fetus[126] it is concluded that the morphological substrate (the necessary pieces) for nociception (pain detection) in the spinal cord exists at very early developmental stages in man. As early as the end of the 1st trimester, the thalamus, third ventricle, midbrain, brain stem, and cerebellar hemispheres are developed and their appearance, besides physical size, will go unchanged throughout the rest of fetal development.[127] Independently, others have also observed many of the important parts of the puzzle early on in development. At seven weeks gestation cutaneous sensory

[125] Lagercrantz, *supra*, 1991 at 1880-5.

[126] Rizvi, T.; Wadhwa, S.; and Bijiani, V. "Development of Spinal Substrate for Nociception" *Pain 4(1987-suppl.): S195.*

[127] Filly, R.A. "Sonographic Anatomy of the Noraml Fetus" In *The Unborn Patient* 2nd ed., edited by M.R. Harrison et al., 92-130, Philadelphia: W.B. Saunders Co., 1991, at p. 122.

receptors appear in the fetus. This development is preceded by the development of synapses or junctions between sensory nerve fibers and interneurons of the spinal cord.[128] A basic sensory response loop is present extremely early in human development. It is noteworthy that, with ultrasound, we can observe movement by the fetus away from outside stimulation by the eighth week.[129] Brain activity, as detected by electroencephalography, is also present at eight weeks gestation.[130] Nature in its wise way prepares the nervous system first so that all the other systems can develop and function as they should.[131]A basic sensory response loop is clearly present shortly after eight weeks gestation. This fact is scientifically logical since pain detection and response to pain are very important parts of a human's ability to survive.

[128] Anand, K.J.S.; and Hickey, P.R. "Pain and Its Effects in the Human Neonate and Fetus." *N Engl J Med* 317(1987): 1321-1329, at p. 1322.

[129] Flower, M.J. "Neuromaturation of the Human Fetus." *J Med Philos* 10(1988): 237-351.

[130] Goldenring, J.M. "Development of the Fetal Brain." *N Engl J Med* 307(1982): 564, at p. 564; Flower, M.J., *supra*.

[131] Kalvger, G.; and Kalvger, M.F. Human Development: *The Span of Life.* St. Louis: The C.V. Mosby Company, 1974, at p. 35.

It was recently discovered that many behaviors characteristic of newborns are clearly present in children with anencephaly (children born without a developed cortex).[132] Previously, these behaviors had erroneously been ascribed to cerebral hemispheric activity[133] (including activity described in the defendant's brief as needed for neocortical reception of body sensations).

Anencephalic children are born without a cerebral cortex.[134] Their expected post birth lifespan ranges from a few hours to a few months.[135] During their post birth lives these children breath spontaneously and have a grasp response.[136] They respond to noxious stimuli known to cause pain by avoidance, by

[132] The Medical Task Force on Anencephaly, (Stumpf, D.A., et al.) "The Infant with Anencephaly" *N Eng J Med* 322(1990): 669-674.

[133] Id.

[134] Shewmon, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781.

[135] Stumpf, D.A., Chair of Medical Task Force on Anencephaly "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674.

[136] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brian Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

withdrawal and by crying.[137] They breath, cough, hiccup, smile, grimace, yawn and suck. In a recent study of twelve anencephalic infants, all twelve responded to pain, all had an exaggerated sustained response to touch, all twelve evidenced spontaneous movement, and all twelve breathed spontaneously.[138] Additionally, seven of the twelve responded to a stimulation at their mouth towards the stimulus (rooting response) and seven of the twelve had a sucking response.[139] Spontaneous movement in the fetus begins between six and seven and one-half weeks gestation.[140]

[137] Stumpf, D.A., Chair of Medical Task Force on Anencephaly. "The Infant With Anencephaly." *N Eng J Med* 322(1990): 669-674. Shewman, D.A.; Capron, A.M.; Peacock, W.J.; and Schulman, B.L. "The Use of Anencephalic Infants as Organ Sources: A Critique." *JAMA* 261(1989): 1773-1781. Van Assche, F.A. "Anencephalics as Organ Donors." *Am J Obstet Gynecol* 163(1990): 599-600. Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[138] Ashwal, S.; Peabody, J.L.; Schneider, S.; Tomasi, L.G.; Emery, J.R.; and Peckham, N. "Anencephaly: Clinical Determination of Brain Death and Neuropathologic Studies." *Pediatr Neurol* 6(1990): 233-239.

[139] *Id.*

[140] de Vries, J.I.P.; Visser, G.H.A.; and Prechtl, H.F.R. "The Emergence of Fetal Behavior. I. Qualitative Aspects." *Early Hum Dev* 7(1982): 301-322. Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

Stimulation of the mouth area resulting in a response towards the stimulus is seen in the child at 9 weeks gestation and sucking is present at 11 weeks gestation.[141] Based upon these behaviors and their incidence in this study, one must conclude that the fetus at 6 to 11 weeks gestation is neurologically developed to a point at least equivalent to the twelve anencephalic children described above. They are all capable of experiencing pain.

In conclusion, the biochemical evidence, unforeseen and unavailable in 1973, supports the very early development of pain detection in the fetus. This evidence is consistent with observed fetal behavior (using real time ultrasound), which shows the fetus moving away from painful stimuli at 8 weeks gestation. Modern instrumentation picks up brain wave activity also at 8 weeks gestation. Together these observations point to an active sensory system present and functioning in the fetus at 8 weeks gestation. Finally, the recent studies on full term anencephalic infants reveal these infants to be neurologically comparable to 6-11 week old fetuses. All of these infants are capable of experiencing pain.

[141] Flower, M.J. "Neomaturation of the Human Fetus." *J Med & Phil* 10(1985): 237-251.

In summary: There is a scientific consensus that a unique human life begins at conception. There is a scientific consensus that pain is experienced after 22-26 weeks gestation. Scientific evidence, unavailable until very recently is consistent with the conclusion that pain is experienced as early as eight weeks gestation. Abortion then results in the painful death of a unique human being, whose life is irreplaceable.

POINT II

ONCE IT IS RECOGNIZED THAT, AS A MATTER OF FACT, A CHILD IS A COMPLETE AND SEPARATE HUMAN BEING PRIOR TO BIRTH CAPABLE OF EXPERIENCING PAIN. ALL EXISTING PRINCIPLES OF CONSTITUTIONAL LAW COMPEL A FINDING THAT THE UNBORN CHILD POSSESSES RIGHTS UNDER THE CONSTITUTION OF THE STATE OF NEW JERSEY AND THE FOURTEENTH AMENDMENT OF THE CONSTITUTION OF THE UNITED STATES. UNDER NEW JERSEY LAW THE LIFE OF A CHILD BEGINS AT CONCEPTION AND THE CHILD ENJOYS A CONSTITUTIONAL RIGHT TO LIVE.

A.

UNDER NEW JERSEY LAW THE CHILD HAS A RIGHT TO LIVE FROM THE MOMENT OF CONCEPTION.

1.

In addition to the showing that there is a universal acceptance of the scientific facts to support the factual conclusion that the life of a child begins at conception, New Jersey has found, as a matter of law, that the life of a child begins at conception.

The Supreme Court of New Jersey has recognized that the unborn child is a separate person and the child is in existence from the moment of conception. *Smith v. Brennan*, 31 N.J. 353, at 362-364, 157 A.2d 497 (1960). In *Smith v. Brennan*, that Court stated:

> "Medical authorities have long recognized that a child is in existence from the moment of conception and not merely a part of its mother's body." 31 N.J. at 362.

The court further observed:

> "It is clear medical authorities recognize that before birth an infant is a distinct entity and that the law of the land recognizes that rights which he will enjoy when born can be violated before his birth." 31 N.J. at 364.

There is no authority in New Jersey which has overruled the legal principles of *Smith* that (1) the life of a child begins at conception and (2) the child possesses rights prior to birth.[142]

2.

[142] See discussion under this point, Section (A)(3) at Pb. 80 to 86.

The New Jersey rule of law, that the life of a child begins at conception, is consistent with virtually all the states and the two branches of the Federal Government which have made legal and factal findings specifically on this point. In addition to New Jersey, thirty-six other jurisdictions have found that the life of a child begins at conception:[143] Alabama,[144] Arizona,[145] Arkansas,[146] California,[147] Connecticut,[148]

[143] There appears to be, perhaps, one state that found otherwise (Kansas) and a few which have declined to address the question.

[144] *Trent v. State*, 15 Ala. App. 485, 488, 73 So. 834, 836 (1916); *Wolfe v. Isbell*, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973); *Eich v. Twon of Gulf Shores*, 293 Ala. 95, 98-99, 300 So. 2d 354, 356-57 (1974).

[145] *Nelson v. Planned Parenthood Center of Tucson*, 19 Ariz. App. 142, 505 p.2d 580, 586 (1973).

[146] Ark. Const. Amend. 68, sec. 2 ('[t]he public policy of Arkansas is to protect the life of every unborn child from conception until birth, ...').

[147] Cal. Civ. Code Sec. 29 (West 1982) ("[a] child conceived but not yet born, is to be deemed an existing person so far as may be necessary for its interests in the even if its subsequent birth") *Scott v. McPheeters*, 33 Cal. App. 2d 629, 634, 92 P.2d 678, 681 (1939).

[148] *Simon v. Mullin*, 34 Conn. Sup. 139, 147, 380 A.2d 1353, 1357 (1977); Conn. Gen. Stat., Ann. Sec. 53-31(a)(1985) ("[t]he public policy of the state and the interest of the legislature is to protect and preserve human life from the moment of conception.") (rep. by P.A. 90-113, sec. 4 (1990)).

Delaware,[149] District of Columbia,[150] Florida,[151] Georgia,[152] Idaho,[153] Illinois,[154] Indiana,[155] Kentucky,[156] Louisiana,[157] Maine,[158] Maryland,[159] Massachusetts,[160]

[149] *Scott v. State*, 49 Del. 401, 409-10, 117 A.2d 831, 835-36 (1955).

[150] *Bonbrest v. Kotz*, 65 F. Supp. 138, 140 (D. D.C. 1946); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 (D.C. Ct. App. 1984).

[151] *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976).

[152] *Hornbuckle v. Plantation Pipe Line Co.*, 212 Ga. 504, 504-05, 93 S.E.2d 727, 728 (1956); *Morrow v. Scott*, 7 Ga. 535, 537 (1849); *Gulf Line Ins. Co. v. Brown*, 181 Ga. App. 72, 74, 351 S.E.2d 267, 269 (1986).

[153] *Nash v. Meyer*, 54 Idaho 283, 301, 31 P.2d273, 280 (1934) (construing state abortion law); *Blake v. Cruz*, 108 Idaho 253, 261, 698 P.2d 315, 323 (1984) (Bistline, J., concurring in part and dissenting in part).

[154] *Renslow v. Mennonite Hospital*, 67 Ill.2d 348, 352-53, 367 N.E.2d 1250, 1252-53 (1977).

[155] *Cheaney v. State*, 259 Ind. 138, 145, 285, N.E.2d 265, 268 (1972); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. App. 1989).

[156] Ky. Rev. Stat. Ann. sec. 311.710(5) (Michie/Bobbs-Merrill 1990); Ky. Rev. Stat. Ann., sec. 311.720(5), (6) (abortion regulations); Kentucky Constitutional Convention Call (H.R. Res. 7, 1978 Gen. Assembly, Reg. Sess., 1978 Ky. Acts 1401).

[157] La. Stat. Ann., sec. 14.2(7) (West 1986); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.), aff'd, 402 So.2d 633 (La. 1991) (Lottinger, J., concurring); *Johnson v. Southern New*

Michigan,[161] Minnesota,[162] Missouri,[163] Montana,[164] Nebraska,[165] Nevada,[166] New Hampshire,[167] New

Orleans Light and Traction Co., Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Danos v. St. Pierre*, 383 So.2d 1019, 1027 (La. App.).

[158] *Smith v. State*, 33 Me. 48, 57 (1851).

[159] *Damasiewicz v. Gorsuch*, 197 Md. 417, 438, 79 A.2d 550, 559 (1951); *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 119, 453 A.2d 1198, 1207 (1983).

[160] *Commonwealth v. Cass*, 392, Mass. 799, 801, 467 N.E.2d 1234, 1325 (1984); *Torigan v. Watertown News Co., Inc.*, 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967).

[161] *Womack v. Buchhorn*, 384 Mich. 718, 725, 187 N.W.2d 218, xxx (1971); *O'Neil v. Morse*, 385 Mich. 130, 188 N.W.2d 785 (1971).

[162] Minn. Stat. Ann., secs. 609.266, 609.2661 through 609.2665, 609.267, 609.2671, 609.2672, 609.268 (1987 & 1992 Supp.); *Verkennes v. Corniea*, 229 Minn. 365, 369, 38 N.W.2d 838, 840 (1949).

[163] Mo. Ann. Stat., sec. 1.205.1(1) (Vernon Supp. 1992); Mo. Ann. Stat., sec. 188.015(6) (Vernon Supp. 1992); *Rodgers v. Danforth*, 486 S.W.2d 258, 259 (Mo. 1972); *Steggall v. Morris*, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953).

[164] Mont. Code Ann., sec. 50-20-102 (1991); Mont. Code Ann., sec. 41-1-103 (1991).

[165] Neb. Rev. Stat., sec. 28-325 (1989); *Hans v. State*, 147 Neb. 67, 72, 22 N.W.2d 385, 389, on rehearing, 147 neb. 73, 25 N.W.2d 35 (1946).

Jersey,[168] New York,[169] North Carolina,[170] North Dakota,[171] Ohio,[172] Oklahoma,[173] Oregon,[174]

[166] *White v. Yup*, 85 Nev. 527, 536-37, 458 P.2d 617, 623 (1969); Nevada Constitutional Convention Call (S.J. Res. 27, 60th Legis., 1979 Nev. Stat. 2014).

[167] *Bennett v. Hymers*, 101 N.H. 483, 485, 147 A.2d 108, 110 (1958); *Wallace v. Wallace*, 120 N.H. 675, 679, 421 A.2d 134, 136 (1980).

[168] *Smith v. Brennan*, 31 N.J. 353, 362, 157 A.2d 497, 502 (1960); Giardina v. Bennett, 111 N.J. 412, 545 A.2d 139 (1988); *State v. Gedicke*, 43 N.J.L. 86, 89-90 (1881); New Jersey Constitutional Convention Call (Act of Apr. 21, 1977, S. 1271).

[169] *Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S.2d 696, 697 (1953) (rejecting viability requirement in cause of action for prenatal injuries); but see, Bryn v. City Hosp. of N.Y. City, 31 N.Y. 2d 194, 199, 335 N.L.S. 2d 390, 392, 286 N.E. 2d 887, 888 (1972).

[170] *DiDonato v. Wortman*, 320 N.C. 423, 435, 358 S.E.2d 489, 496 (1987) (recognizing cause of action for wrongful death of a viable unborn child); *Corkey v. Edwards*, 322 F. Supp. 1252 (W.D.N.C. 1971).

[171] N.D. Cen. Code, secs. 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (rejecting viability requirement in cause of action for prenatal injuries and live birth requirement in wrongful death actions).

[172] *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970) (construing criminal abortion law); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949).

[173] Okla. Stat. Ann., tit. 63, sec. 1-730(2) (1984) (abortion regulations); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (rejecting

Pennsylvania,[175] Rhode Island,[176] South Dakota,[177] Texas,[178] Utah,[179] Virginia,[180] and Wisconsin.[181]

viability requirements in cause of action for prenatal injuries and live birth requirement in wrongful death actions).

[174] *State v. Ausplund*, 86 Or. 121, 131-132, 167 P. 1019, 1022-23 (1917) (construing criminal abortion law); *Mallison v. Pomeroy*, 205 Or. 690, 696-97, 291 P.2d 225, 228 (1955) (recognizing cause of action for prenatal injuries); *Libbee v. Permanente Clinic*, 268 Or. 258, 518 P.2d 636, 520 P. 2d 361 (1974) (recognizing cause of action for the wrongful death of a viable stillborn child).

[175] Pa. Cons. Stat. Ann., tit. 18, sec. 3203 (Purdon's 1992 Supp.); *Amadio v. Levin*, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985) (rejecting both viability and live birth requirements in wrongful death actions); *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960) (rejecting viability requirement in cause of action for prenatal injuries).

[176] R.I. Gen. Laws, sec. 11-3-4 (1981) (1973 R.I. Pub. Laws 68-70, ch. 15, sec. 2) (criminal abortion statute); *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 222, 223-24 (1966) (rejecting viability requirement in cause of action for prenatal injuries); *Presley v. Newport Hospital*, 117 R.I. 177, 183, 365 A.2d 748, 751 (1976) (rejecting live birth requirement in wrongful death of a viable unborn child).

[177] *State v. Munson*, 86 S.D. 663, 669, 201 N.W.2d 123, 126 (1972), vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law).

[178] *Thompson v. State*, 493 S.W.2d 913, 918 (Tex. Crim. App. 1971) vacated and remanded, 410 U.S. 950 (1973) (construing criminal abortion law); *Leal v. C.C. Pitts Sand and Gravel, Inc.*, 419 S.W.2d 820, 822 (Tex. 1967) (recognizing cause of action for wrongful death for prenatal injuries where death occurs after live birth).

A specific list of precise quotations from each of these states which supports the conclusion that the life of a person begins at conception is found at the back of this brief in Appendix C.

In addition, although the United States Supreme Court stated in *Roe* in 1973 that it was unable, at that time, to state when life began, the two other branches of the federal government have since made specific findings or declarations that the life of a person begins at conception. In 1981 the subcommittee on Separation of Power of the Committee on the Judiciary of the United States Senate published a report, following substantial hearings, in which the committee found, as a matter of scientific fact, that life begins at conception:

[179] Utah Code Ann., sec. 76-7-301.1(1) (1992) (preamble to Utah abortion law); Sec. 76-7-301.1(2), sec. 76-7-301.1(3); Utah Code Ann., sec. 76-5-201(1) (1992 Supp.).

[180] *Kalafut v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990) (rejecting viability rule in cause of action for prenatal injuries or for wrongful death following live birth).

[181] Wis. Stat. Ann., sec. 940.04(6) (West 1982); *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163, 170 (1959) (rejecting viability requirement in cause of action for prenatal injuries); *Kwaterski v. State Farm Mut. Auto. Ins. Co.*, 34 Wis.2d 14, 21, 148 N.W.2d 107, 111 (1966) (rejecting born alive requirement in wrongful death actions).

> "... today the facts are beyond dispute. Physicians, biologists, and other scientists agree that conception marks the beginning of the life of a human being ..."[182]

On January 14, 1988 President Reagan issued a proclamation, No. 5761, which stated in part:

> "... I, Ronald Reagan, president of the United States of America, by virtue of the authority vested in me by the Constitution and laws of the United States, do hereby proclaim and declare the unalienable personhood of every American from the moment of conception until natural death, and ... I will take care that the Constitution and laws of the United States are faithfully executed for the protection of American's unborn children ..."[183] (emphasis added)

In short, the conclusion that the life of a child begins at conception is supported by a clear consensus in the scientific community, as a matter of scientific fact, and is supported by a virtual unanimity of jurisdictions as a matter of law. This overwhelming authority supports the soundness of New Jersey law under *Smith v. Brennan* that the life of a child beings at conception.

3.

[182] Report on Human Life Bill, Subcommittee on Separation of Powers Committee on the Judiciary United States Senate (97th Cong. 1st Sess. 1981) p. 7.

[183] See Proclamation No. 5761 Exhibit W at 82a.

Under existing New Jersey law a child has a constitutional right to live from the moment of conception and the state's policy [absent *Roe*] is to protect the life of a child prior to birth. In *Raleigh Fitkin-Paul Morgan Memorial Hospital v. Anderson*, 42 N.J. 421, 201 A.2d 537 (1964), the New Jersey Supreme Court found that the state had an interest in protecting the life of a child prior to birth. The court found that that right was personalized to the child and the court appointed a guardian ad litem. 42 N.J. at 423, 424. The health of the child was protected while the child was in the mother's womb even over the objection of the baby's mother.

This right of the child found in *Raleigh Fitkin* is reflective not only of the strong policy of New Jersey, but the legal conclusion that children enjoy the right to live under our state constitution. In *Gleitman v. Cosgrove*, 49 N.J. 22, 227 A.2d (1967) the New Jersey Supreme Court stated that a child possesses a right to life:

> "The right to life is inalienable in our society...we are not faced here with the necessity of balancing the mother's life against that of her child. The sanctity of a single human life is the decisive factor...(that) it may have been easier for the mother and less expensive for the father to terminate the life of the child while he was an embryo, but these alleged detriments cannot stand against the preciousness of a single human life..." 49 N.J. at 30, 31.

As recently as July, 1992 the New Jersey Supreme Court reaffirmed that interpretation of *Gleitman*. Writing for the majority in *Hummel v. Reiss*, 129 N.J. 118 (1992) Justice Clifford wrote:

> "In *Gleitman* the Court observed that '[a] child need not be perfect to have a worthwhile life,' (citation omitted) and found that, '[e]ugenic considerations are not controlling,' ibid., noting that considerations of financial burden to the father and convenience of the mother did not outweigh the child's right to live, albeit imperfectly." 49 N.J. at 30-31, 227 A.2d 689 (emphasis added). *Hummel v. Reiss*, 129 N.J. at 126.

Even after the New Jersey Supreme Court, in 1979, found itself compelled to extend a tort action to a couple for wrongful birth because of the decision of the U.S. Supreme Court in *Roe v. Wade* in 1973, that court acknowledged the child's constitutional right to live under the state constitution and underscored the state's policy of preferring life over non-existence.

> "One of the most deeply held beliefs of our society is that life...is more precious than nonlife (citation omitted)...concrete manifestations of this belief are not difficult to discover. Documents which set forth principles upon which our society are founded are replete with references to the sanctity of life. The Federal Constitution characterizes life as one of the three fundamental rights of which no one can be deprived without due process of law...our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), ART. 1, SEC. 1. The declaration of independence states that the primacy of man's 'inalienable' right to life is a 'self-evident truth.' Nowhere in these documents is there to be found an

> indication that the life of persons suffering from handicaps are to be less cherished than those non-handicapped beings. *Berman v. Allan*, 80 N.J. 420, 429 (1979) (emphasis added).

It is clear that New Jersey considers a child a person from the moment of conception who enjoys the right to live. In addition, the constitutional right to defend life is part of the child's rights. N.J. Const. (1947), ART. 1, SEC. 1.

This right, of course, is independent of the right the child possesses prior to birth under the Federal Constitution (see discussion below under this point Sec. B to D). To the extent the current federal law could be construed against the child and it eclipses the state right, the state constitution would still protect the child from "viability" to birth. *Roe v. Wade*, 410 U.S. at 164, 165, 93 S.Ct. at 732 (1973); *Planned Parenthood of Southeastern Pennsylvania v. Casey*, ___ U.S. ___, 112 S.Ct. at 2804, Slip Op. at 4 (1992).

That the child is an individual who enjoys rights after viability, despite *Roe*, was specifically stated by the New Jersey Supreme Court in the case of *In the Matter of Baby M.* The court observed:

> "The balance struck in *Roe v. Wade* recognizes increasing rights in the fetus..." *Baby M.*, 109 N.J. 396, at 449 N.13, (1988).

It is clear that the unborn child is a person who possessed rights.[184]

"Viability" happens to be, whether discussed in the context of the state issues or that of the federal, an arbitrary point of reference that has no true relevence of a factual, moral or legal nature. That it has taken on a significance and is really nothing other than a rationalization derived from the inability of the U.S. Supreme Court to determine when life began.

Factually, it is now clear that the child is as separate and complete before viability as after (see Point I(B)). When modern medicine performs operations, under anesthesia, on children who are only eighteen weeks old from conception, is there any true doubt that these children are complete, separate, unique human beings?

Morally, brutal and painful destruction of the lives of these children is no less reprehensible than if they reached the age of 23 weeks [or earlier as the "viability" point progresses forward.]

[184] We note also that in 1977 the New Jersey legislature passed an act which specifically requested the U.S. Cong. to call a convention to propose an amendment to the U.S. Constitution to deem every human being in the country a person from the moment of conception. New Jersey Constitutional Convention call (act of APP. 21, 1977, S.1271).

Legally, there is no sound principle of common law or constitutional law which justifies the taking of the life of one class of children, but not the other. That a child is dependent upon his or her mother does not change that reality.

In *Smith v. Brennan*, the New Jersey Supreme Court quoted with approval Chief Justice Brogan's dissent in *Stemmer v. Kline*, 128 N.J.L. 455, 466, 26 A2d 489, 687 (1942):

> While it is a fact that there is a close dependence by the unborn child on the organism of the mother, it is not disputed today that the mother and the child are two separate and distinct entities; that the unborn child has its own system of circulation of the blood separate and apart from the mother; that there is no communication between the two circulation systems; that the heart beat of the child is not in tune with that of the mother but is more rapid; that there is no dependence by the child on the mother except for sustenance. <u>It might be remarked here that even after birth the child depends for sustenance upon the mother or upon a third party. It is not the fact that an unborn child is part of the mother, but that rather in the unborn state it lived with the mother, we might say, and from conception on developed its own distinct, separate personality</u>. [emphasis added.]

This very point, that dependence is irrelevant to the child's separate existence was eloquently made in *Kelly v. Gregory*, 282 A.D. 542, 543-44, 125 N.Y.S. 2d 696, 697 (1953):

> The mother's biological contribution from conception on is nourishment and protection; but the foetus has become a separate organism and remains so throughout its life. That it may not live if its protection and nourishment are

> cut off earlier than the viable stage of its development is not to destroy its separability; it is rather to describe conditions under which life will not continue. Succeeding conditions, exist, of course, that have that result at every stage of its life, post-natal as well as pre-natal. Id. at 544, 125 N.Y.S. 2d at 697.

Most of the states which have specifically addressed the question have found as a matter of law that viability has no factual or legal relevance. *Wolfe v. Isbell*, 291 Ala. 327, 331, 280 So.2d 758, 761 (1973) (Ala.), *Simon v. Mullin*, 34 Conn. Sup. 139, 380 A.2d 1353 (1977) (Conn.); *Greater Southeast Community Hosp. v. Williams*, 482 A.2d 394, 396 (D.C. Ct. App. 1984); *Day v. Nationwide Mut. Ins. Co.*, 328 So.2d 560, 561 (1976) (Fla.); *Renslow v. Mennonite Hospital*, 67 Ill. 2d 348, 352-53, 367 N.E. 2d 1250, 1252-53 (1977); *Cheaney v. State*, 259 Ind. 138, 145, 285, N.E.2d 265, 268 (1972); *Cowe v. Forum Group, Inc.*, 541 N.E.2d 962, 967-68 (Ind. App. 1989); *Johnson v. Southern New Orleans Light and Traction Co.*, Docket 9048 (La. App. Orl. Dec. 10, 1923); *Valence v. La. Power & Light Co.*, 50 So.2d 847 (La. App. 1951); *Smith v. State*, 33 Me. 48, 57 (1851); *Group Health Ass'n v. Blumenthal*, 295 Md. 104, 119, 453 A.2d N.E.2d 926, 927 (1967); *Torigan v. Watertown News Co., Inc.*, 352 Mass. 446, 449, 225 N.E.2d 926, 927 (1967); *Womack v. Buchhorn*,

384 Mich. 718, 725, 187 N.W.2d 218 (1971); *Steggall v. Morris*, 363 Mo. 1224, 1229-33, 258 S.W.2d 577, 579-81 (1953); N.D. Cen. Code, secs. 12.1-17.1-02 through 12.1-17.1-06 (Supp. 1991); *Hopkins v. McBane*, 359 N.W.2d 862, 865 (N.D.); *Williams v. Marion Rapid Transit*, 152 Ohio St. 114, 128-29, 39 Ohio Ops. 433, 439-40, 87 N.E.2d 334, 340 (1949); *Steinberg v. Brown*, 321 F.Supp. 741, 746 (N.D. Ohio 1970); *Evans v. Olson*, 550 P.2d 924, 925 (1976) (Okla.); *Amadio v. Levin*, 509 Pa. 199, 204, 501 A.2d 1085, 1087 (1985), *Sinkler v. Kneale*, 401 Pa. 267, 273, 164 A.2d 93, 96 (1960); *Sylvia v. Gobeille*, 101 R.I. 76, 79, 220 A.2d 22, 223-24 (1966); *Kalafut v. Gruver*, 239 Va. 278, 283-84, 389 S.E.2d 681, 683-84 (1990); and *Puhl v. Milwaukee Auto Ins. Co.*, 8 Wis.2d 343, 99 N.W.2d 163, 170 (1959).

Smith v. Brennan, in explaining the illogical nature of extending an arbitrary significance to "viability" observed:

> The most important consideration, however, is that the viability distinction has no relevance to the injustice of denying recovery for harm which can be proved to have resulted from the wrongful act of another. Whether viable or not at the time of the injury, the child sustains the same harm after birth, and therefore, should be given the

same opportunity for redress. Id. at 367, 157 A.2d at 504.[185]

The mother, it might be added, is not the giver or creator of life, any more than the "state". She is the trustee of the child's life. As such, her unique relationship, as with all persons who are placed in, or who accept, the role of one in a position of trust, she has the greatest obligations to the subject of that relationship, the child. That the child is dependent upon her for nourishment and protection is no different later in life. That she is the only person who can provide it at one stage of the child's life simply places her in a greater position of trust. Dependence creates obligations, not liberty to terminate life. The decisive factor which creates obligation and the trust relationship is the free choice she made by intentionally accepting conception, or voluntarily accepting the risk of it.

B.

THE RIGHT TO LIVE DEPENDS ONLY UPON THE EXISTENCE OF AN INDIVIDUAL.

[185] *Giardina v. Bennett*, 111 N.J. 412, 545 A.2d 139 (1988) is not contrary. *Giardina* merely construes the wrongful death statute and the legislative intent to change the common law to create a new form of tort action for specific losses based upon existing relationships and dependencies.

1.

The right to live is the most basic, unique and inalienable right within our society. It is not derived or dependent upon a political grant but flows from the fact of an individual's existence. Neither the state nor the federal governments have the power to impose restrictions or qualifications that result in creating a class of human beings excluded from the enjoyment of this right. The individual lives of people give life to government and government exists for them. In short, the unique nature of the right itself prohibits qualification by classification.

In New Jersey this principle is made plain, both by the language of the constitution, and by the case law which construes it. Art. I, Section 1, states in relevant part:

> "All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life..."

Our Supreme Court has stated, concerning this clause, that:

> "Our own constitution proclaims that the 'enjoyment and defending of life' is a natural right. N.J. Const. (1947), Art. I, Sec. 1." *Berman v. Allan*, 80 N.J. 420, 429 (1979).

Our constitution acknowledges, therefore, that the right to live is a grant of nature, not government.

In founding the United States of America the congress saw the right to life as beyond the reach of government. The Declaration of Independence states that man's 'unalienable' right to life is a 'self-evident truth.' Specifically, it states:

> "We hold these truth to be self-evident, that all men are created equal, that they are endowed by their creator with certain unalienable rights, that among these are life ..."

But the founders made plain that the basic function of the new government was to protect that right, that government existed for that very purpose:

> "That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the government..." In Congress, July 4, 1776; "A Declaration of the Representatives of the United States of America, in General Congress assembled."

Inherent in this concept, embodied in both the state constitution and the document which both founded and declared the purpose of our federal government, is that no political body has the power to redefine or limit the class of human beings to which the right attaches by one's very existence. This is the very meaning of the word "unalienable" - that it cannot be separated from the being.

The framers of the Thirteenth and Fourteenth Amendments both understood and acknowledged this principle that government was powerless to deprive an individual human being of the unalienable right to live.

Thus Representative Thaddeus Stevens, on the date the thirteenth amendment was declared ratified, proclaimed:

> This is man's Government; the Government of all men alike; not that all men will have equal power and sway within it. Accidental circumstances, natural and acquired endowment and ability, will vary their fortunes. But equal rights to all the privileges of Government is *innate in every immortal being, no matter what the shape or color of the tabernacle which it inhabits.*

Cong. Globe, 39th Cong., 1st Sess. 74(1865) (emphasis added).

Likewise Representative John A. Bingham, author of section one of the fourteenth amendment, declared in reference to the fifth amendment the principle he viewed as fundamental:

> [T]he Constitution of the United States ... declared that "no person shall be deprived of life, liberty, or property without due process of law." By that great law of ours it is not inquired whether a man is "free" by the laws of England; it is only to be inquired *is he a man*, and therefore free by the law of that creative energy which breathed into his nostrils the breath of life, and he became a living soul, endowed with the rights of life and liberty ... Before that great law *the only question to be asked of a creature claiming its protection is this: Is he a man?* Every man is entitled to the protection of American law, because

> its divine spirit of equality declares that all men are created equal.

Cong. Globe, 40th Cong., 1st Sess. 542 (1867) (emphasis added).

Representative James S. Brown, similarly, denied the notion that the basis for the right to life required anything other than human life itself:

> [D]oes the term "person" carry with it anything further than a simple allusion to the existence of the individual? It certainly cannot be strained into any recognition of slavery, since the very recognition of personality excludes [an institution which] does not regard its victims as persons but as chattels.

Cong. Globe, 38th Cong., 1st Sess. 1753 (1864).

Indeed, examples are legion to demonstrate the basic assumption of the framers and their contemporaries that "in the eyes of the Constitution, every *human being* within its sphere ... from the President to the slave, is a *person*." Cong. Globe, 37th Cong., 2d Sess. 1449 (1862) (Sen. Sumner) (first emphasis added).[186]

[186] E.g., Cong. Globe, 39th Cong., 1st Sess. 77(1866)(Sen. Trumbull) ("any legislation of any public sentiment which deprives any human being in the land of those great rights of liberty will be in defiance of the constitution"); id. at 322-23 (Sen. Trumbull) ("great object of securing to every human being within the jurisdiction of the Republic equal rights before the law"); id. at 1159 (Rep. Windom) (rights to life, liberty, and pursuit of happiness are "rights of human nature," and the most basic "right

The lack of power of the government to exclude from the persons protected under the fourteenth amendment, was forcefully stated by Representative Joshua R. Giddings,

> Our fathers, recognizing God as the author of human life, proclaimed it a "self-evident" truth that every human being holds from the Creator an inalienable right to live ...
>
> ...If this right be denied, no other can be acknowledged. If there be exceptions to this central, this universal proposition, that *all* men, without respect to complexion or condition, hold from the Creator the right to live, who shall determine what portion of the community shall be slain? And who may perpetuate the murders?

Cong. Globe, 35th Cong., 1st Sess. App. 65-66 (1858) (emphasis in original).

3.

The unique nature of the right to live is that which is critical. It is more than a right, more than even what has become known as a "fundamental right." Many fundamental rights (such as the "rights" to vote, and to own property) are governmental grants limited to those who are capable of exercising them. These are the

of human nature [is] the right to exist"); id. at 1151 (Rep. Thayer) ("relief of human nature" secured in thirteenth amendment); 3 Cong. Rec. 1794 (1875) (Senator Alen G. Thurman) (may not deny equal protection to "any person" in the jurisdiction, "be he sane or be he insane, *be he old or be he young*, be he innocent or he criminal, be he learned or be he ignorant") (emphasis added).

kinds of rights which someone can be denied because they arise from government. The existence of an individual renders *Roe's* review of clauses such as the qualifications for president inappropriate. Those clauses deal with privileges or rights which government has the power to limit because the nature and power of the government itself created it. The nature of public office, the nature of legal ownership and the right to vote all vary from government to government around the world. Life is the universal constant of all peoples everywhere that is in no way derived from a political body. It is the same under all forms of government. No age or physical trait can limit its nature.

A human being exists when he or she is complete unto him or herself. That one is dependent upon adults is only a reason to extend protection, not a reason to deny it. Viability or birth are not transcendent concepts - they are conditional circumstances. Every single human being exists only under conditional circumstances.

C.

IF THE STATE POSSESSES A RIGHT TO PROTECT THE LIFE OF A CHILD BEFORE BIRTH, THE CHILD MUST POSSESS A RIGHT TO PROTECT ITS OWN LIFE.

The U.S. Supreme Court has held that a state has the right to protect the life of a child prior to birth, and the state's interest is

sufficient to justify prohibiting abortion after viability. *Roe v. Wade*, 410 U.S. 113, at 164, 165, 93 S.Ct. 705, at 732 (1973); *Planned Parenthood of S.E. Pa. v. Casey*, ___ U.S. ___, 112 S.Ct. 279 at 2804, Slip Op. at 4 (1992).

Once it is recognized, as a matter of fact and law, that the child is a human being from conception to birth, the presence of a recognized interest in the state to protect that individual implies a legal right of the individual to protect himself. That the state has a right to protect an individual but the being himself lacks a right is repugnant to the very nature of the right to protect life under federal and state law. [see discussion, above, under Point II(B)].

The true nature of the state's interest is its *parens patriae* jurisdiction. *Santosky v. Kraemer*, 455 U.S. 745, 766, 102 S.Ct. 1388, 1401 (1982). *Parens patriae* refers to the role of a state as guardian of a person under legal disability. *Snapp v. Puerto Rico*, 458 U.S. 590, at 600 (n.8), 102 S.Ct. 3260, 3265 (1982). It is in this role that the state has the power to act for the benefit of a child in "loco parentis." *Kraemer, supra*. *Kraemer* defined the state's interest in preserving and promoting the welfare of a child as part of its *parens patriae* jurisdiction. When a state asserts the interest of the child, even fundamental Constitutional rights of a

parent may be defeated. *Santosky v. Kraemer, supra*. But the *parens patriae* interest of a state cannot exist without a co-existing personal right of the individual being protected. C.f. *Snapp v. Puerto Rico*, 458 U.S. 592, 600, 102 S.Ct. 3260, 3265. See, also *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 486, 95 S.Ct. 1029, 1042 (1975) (drawing a distinction in how a state may protect an individual's exercise of his rights.)

It is clear, under *Snapp*, that in instances where an individual can be identified, a state does not possess the standing to prosecute an action to protect the interests of an individual, only the individual can do so because the state would only be a nominal party. 458 U.S. at 600, 601, 607, 102 S.Ct. at 3265, 3268, 3269. See *Pennsylvania v. New Jersey*, 426 U.S. 660, 96 S.Ct. 2333 (1976); *Oklahoma v. Atchison*, T.&S.F.R. Co., 220 U.S. 277 (1911). Because of the ability to identify the child in this suit, the state could not have standing to maintain it. Only the child's father would have such standing.

The State has the right to exercise its *parens patriae* power independent of the individual's right, but the state action must be taken on behalf of an unidentifiable group. This is the basis, although unexpressed, for the *Roe* court to find that the state has

an interest to protect the child (although only referred to as "potential" life in 1973)[187] and even prohibit abortion after viability. But this right or interest of the state cannot exist unexercised and, at the same time, the law refuse to recognize the right of the individual to protect himself. What could possibly constitute a greater violation of the spirit and purpose of government than a political entity, created to protect the great unalienable right to live, refusing to exercise its power to protect a human being on the one hand, and refusing to recognize the right of that individual to act to protect himself? There is no greater violation of the rights of man, except perhaps, the fact that the state of New Jersey has taken affirmative steps to specifically authorize, license and supervise the taking of the very life in question.

D.

DENYING CHILDREN THE RIGHT TO LIVE ON THE BASIS OF THEIR STATUS AS "UNBORN" IS IN VIOLATION OF THE EQUAL PROTECTION OF THE LAWS UNDER BOTH THE STATE AND FEDERAL CONSTITUTIONS.

1. INTRODUCTION

[187] See discussion below under Point III(C) at Pb. 105 to 108.

The acknowledgement that a child is a human being, as a matter of fact, and law, renders denial of the right to live to the child a violation of the equal protection of the laws under both the state and federal constitutions.[188] In *U.S.A. Chamber of Commerce v. State*, 889 N.J. 131 at 157, 158 (1982):

[188] This section of the brief deals only with the question of whether a child possesses a right to live in the first instance. The question of whether the unborn child's circumstance creates a sufficient difference to justify termination of the child's life is really a question of balancing the child's rights against those of the mother. Although it relates to equal protection this balancing question is treated under Point V below. See also, discussion on viability, at Pb. 81-18 to Pb. 85-6 above.

> "When (state action) regulates 'fundamental rights' or 'suspect classes' it will be subject to 'strict scrutiny' and the state will be required to demonstrate (1) that a compelling need justifies the legislation and (2) that no less restrictive alternative will accomplish that state objective. See *Graham v. Richardson*, 403 U.S. 365, 91 S.Ct. 1848, 29 L.Ed.2d 534 (1971). At the other end of the spectrum is the rational basis test. Under this standard of review, a court inquires whether there is a conceivable, legitimate state objective and second whether the classification selected is rationally related to that objective. Id. at 371-72, 91 S.Ct. at 1851-52, 29 L.Ed.2d. at 541; *Dandridge v. Williams, supra*, 397 U.S. at 486-87, 90 S.Ct. at 1162, 25 L.Ed.2d. at 502-503. In considering the second, the categories need not be formed with mathematical nicety and legislatures may attack a problem one step at a time. *Williamson v. Lee Optical, supra*, 340.

Under New Jersey law equal protection requirements are even stricter that those under the Federal Constitution. *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982).

2. THE CLASSIFICATION DRAWN BY NEW JERSEY EXTENDING THE RIGHT TO LIVE TO SOME CHILDREN, BUT DENYING IT TO OTHERS MUST BE STRICTLY SCRUTINIZED AND REQUIRES A COMPELLING INTEREST FOR ITS JUSTIFICATION.

Classifications that are subject to equal protection scrutiny under the Fourteenth Amendment of the United States Constitution may rise under the case law or common law of the State as well as under its legislative enactments. *Jersey Shore*

Medical Center - Fitkin Hospital, et al. v. Estate of Baum, 84 N.J. 137, 143, 144, 145 (1980).

The New Jersey Supreme Court, in *Jersey Shore* has stated:

> The Fourteenth Amendment of the United States Constitution applies to state common law as well as statutory law. The applicability of the equal protection clause depends not on whether a state has exercised its power in any particular form, but whether it has, in fact, exercised that power. *New York Times Co. v. Sullivan*, 376 U.S. 254, 265, 84 S.Ct. 710, 718, 11 L.Ed.2d. 686, 697 (1964). A state is obligated to provide equal protection of its laws not only in the acts of its legislature, but also in the decisions of its courts. Stated otherwise 'it has been recognized that the actions of state courts in enforcing a substantive common law rule formulated by those courts, may result in denial of rights guaranteed by the Fourteenth Amendment, even though the judicial proceedings, in such cases may have been in complete accord with the most rigorous conceptions of procedural due process.' *Shelly v. Kraemer*, 334 U.S. 117, 68 S.Ct. 836, 844, 92 L.Ed. 1161, 1182-1183 (1948) (footnote omitted) (further citations omitted). Accordingly, the discrimination against husbands which results from application of the New Jersey Common Law Doctrine of Necessaries may be challenged under the Equal Protection Clause of the Fourteenth Amendment. *Jersey Shore v. Estate of Baum*, 84 N.J. at 144, 145.

The classification created by New Jersey, denying as it does, a "fundamental right" (although, as an unalienable right it is more basic than a "fundamental" right) requires a showing of a compelling state interest to satisfy both the equal protection principles of the U.S. Constitution and that of the State of New

Jersey. *Shapiro v. Thompson*, 394 U.S. 618, 638 (1969); *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533, 561-562 (1964); *Kraemer v. Union Free School District*, 395 U.S. 621, 626-628 (1969); *Dunn v. Blumstein*, 405 U.S. 330 (1972); Cf. *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). *Right to Choose v. Byrne*, 91 N.J. 287, 450 A.2d 925 (1982); See, *D.Y.F.S. v. A.W.*, 103 N.J. 591 (1986).

However, the principles of equal protection which apply to even the fundamental rights that are by their nature granted by government (such as the right to vote and aspects of the right to privacy) require the greatest of scrutiny where the right to life itself is involved. This right, by its nature, derives from the existence of the individual, not from governmental grants.[189]

POINT III

THE SCOPE AND NATURE OF A MOTHER'S RIGHT: ALTHOUGH, TO BE JUST AND LASTING, THE CONSTITUTIONAL PRINCIPLES GOVERNING A WOMAN'S RIGHTS AND OBLIGATIONS CONCERNING ABORTION REQUIRE THE RECOGNITION THAT A WOMAN'S *GRISWOLD* RIGHTS INCLUDE VOLUNTARY AND FREE DECISIONS CONCERNING PROCREATION, A MOTHER'S RIGHT MUST ONLY REFLECT HER TRUE INTERESTS AND MUST ACCOUNT FOR THE FACT

[189] See discussion under Point II, Section B above.